IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

No. 355

W. O. BROWNE, E. W. NEGLEY, M. J. DOBSON, MERRILL NEWMAN, MORRIS J. NEWMAN, and BEN T. STOWELL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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VS.

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Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, W. O. Browne, E. W. Negley, M. J. Dobson, Merrill Newman, Morris J. Newman and Ben T. Stowell, pray that a Writ of Certiorari be issued by this court to review a judgment of the Circuit Court of Appeals For the Fifth Circuit entered May 23, 1946 (R. 1190) affirming a judgment of the United States District Court for the Western District of Texas. The judgment by the Cir-

cuit Court of Appeals was amended slightly on June 3, 1946 (R. 1191) by including the name of O. H. Woodard—one of the defendants but not one of these petitioners—in a certain portion of the judgment and which the name of O. H. Woodward was through a clerical error omitted from the judgment as first rendered by said Circuit Court of Appeals.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals was rendered and filed May 23, 1946, and is set out in the Printed Record at pages 1184 to 1189. It has not yet been printed in the Federal Reporter.

STATEMENT OF THE CASE.

The first five counts of the indictment charge violations of the Mail Fraud Statute (Tit. 18, U.S.C.A., Sec. 338). Counts Six to Ten inclusive charge violations of the Securities Act (Sec. 77q (a) (1) of Tit. 15, U.S.C.A.). Count Eleven charges the violation of a conspiracy statute (Tit. 18, U.S.C.A. Sec. 88).

Petitioners were sentenced by the trial court to three years' imprisonment on the first count, and fifteen months' imprisonment on the eleventh count, "said sentences to be cumulative", and to pay a fine of $1,000 (R. 158).

The Indictment.

The indictment (Count One) charges that the defendants devised a scheme which contemplated the purchase or pretended purchase by the defendant Mansfield from the Securities Company of San Antonio, Texas, of a large tract of land in Brewster County, Texas. Mansfield, operating under his own name, acted as wholesaler, and the remainder of the defendants engaged in the sale of parcels directly to individuals (R. 8). When the sale was effected, Mansfield executed warranty deeds in the name of the purchaser, as grantee, which he would send my mail to the County Clerk of Brewster County with instructions to record the same and to forward them to one of the defendants or to the named grantee.

According to the indictment, the scheme contemplated that representations would be made that the tract was potential oil land and that defendant Thigpen was engaged

in drilling an oil well to test the land, and that *if said well were completed as a commercial producing well,* the land which investors might buy would become very valuable and they would realize large profits from bonuses for leases which major oil companies would take (R. 9).

It is charged that Thigpen did make an effort, extending from June 20, 1940 to February 20, 1941, at drilling a well in one of the sections, but it was abandoned at about 1200 feet, when water was encountered. A second well was to be, and was, drilled by Thigpen in another section, but was intended to produce water. This well was likewise abandoned.

The indictment charges that numerous sales of land were made to investors upon various false representations, including the statement that the drilling of the test well was in progress, when it was not; that major oil companies were interested in the tract; that the prospects for the finding of oil were favorable; that the purchase was not a gamble; that some of the defendants had invested personally in the project; that a large check, represented to be the check of a major oil company, was shown to various customers; that the land had potential mineral value, and that the investors would receive a deed conveying valid title, "whereas, says the indictment, in truth and in fact said representation was false, in that the investors would not *in every instance* receive deeds conveying valid title." (R. 18.)

Count One then states the specific offense by charging that, having devised or intended to devise the scheme, for the purpose of executing it, the defendants "did knowingly, wilfully, fraudulently and feloniously cause to be delivered, by mail, *a certain letter* and warranty deed." This is the "Count" letter of August 15, 1941. (R. 19.)

The other Mail Fraud counts were identical with Count One, except as to the specified instances of mailing.

Count Six, typical of all of the Securities Act counts, (Six to Ten inclusive) incorporates, by reference, the allegations as to the scheme in the first count, and then alleges that the defendants "knowingly, in the sale of securities, namely, 'investment contracts' evidenced by warranty deeds, coupled with collateral agreements and undertakings to the effect that an oil well would be, and was being, drilled in order to test and prove the productivity of the area, by the use of United States mails, did employ the scheme."

Appended to each count are deeds to parcels of the land in question which were alleged as having been sent through the mails. (R. 23.)

The Eleventh count is the conspiracy count, which charges that the defendants conspired "to commit the various offenses against the United States *which are set out and fully described in the first ten counts of this indictment.*" Each of the overt acts alleged in the preceding ten counts of the indictment are alleged as overt acts in the conspiracy count, together with nine other overt acts, all of which were committed by Mansfield and Thigpen, none of the other defendants being charged as participants. (R. 45-46.)

The Evidence.

Inasmuch as under the rules of this Court only such statement of the case is necessary or proper which is material to the consideration of the questions presented, no attempt will here be made to review or summarize the record.

Twenty-two customer witnesses testified as to representations made to them by various of the defendants in per-

sonal sales interviews. The same sales approach was used by the various salesmen who, indeed, competed against themselves. There was no proof that any of the petitioners had any knowledge whatsoever as to Mansfield's status as owner of, or contractor for, the land, and they had no knowledge as to what were the transactions between Mansfield and Thigpen and Bailey. So far as the representations of petitioners are concerned, the evidence fell far short of the allegations of the indictment.

There was no evidence that any of the petitioners herein were in any way connected with the mailing of the letter and enclosed deed, specified in the first count as the offense against the Mail Fraud statute, and no evidence that they caused the mails so to be used. The same situation exists as to each of the other substantive counts of the indictment. All of the mailings, specifically described in the substantive counts of the indictment, occurred at the instance and under the direction of the defendant Mansfield, and no one else. (R. 19, 20, 21, 22, 23, 25, 29, 34, 37, 43.)

Fair descriptions of the land being sold were contained in all the printed forms used by the defendants, including petitioners. The customers were told: that the Subdivider advises that the tract is sold as raw land, *without any improvements or development program whatsoever;* that the property was reached by military road 85 miles south of Alpine, Texas, the nearest paved highway; that the land was rough and badly faulted and the country practically unsettled, the surface of the land being of little value for any purpose; that most of the area was inaccessible except on foot or horseback, and is practically uninhabited; that the area consisted of sedimentary rocks and was spot-

ted with volcanic plugs and lava flow; that the prospects for discovering oil and gas are decidedly unfavorable; that little or nothing is known regarding the mineral possibilities of the land, and that, while the general area has some value as mineral prospect land, the location of minerals would be due purely to chance; that various showings of oil had been encountered in wells drilled several miles to the north of his project in an area known as Green Valley, but that the Valley differs in character from the land in this project, and that prospective purchasers should realize that any estimate of the amount of minerals recoverable should not be considered as reliable or accurate, and that any estimate of minerals recoverable from other tracts, used for comparative purposes, should be totally disregarded as a basis for investment in this tract. (Exhibit G-56, R. 1073-1078.)

The trial court permitted to be introduced into the record, and to be considered by the jury, a damaging map and evidence of transactions had with strangers to the indictment, of which transactions the petitioners had no knowledge and with which they had no connection, on the ground that such evidence was relevant on the question of intent of the defendants on trial. (R. 662, 663, 672-674, and Government Exhibit 100, introduced at page 673 of the Printed Record, in connection with the testimony of Gunhild Benson (R. 662).

The Instructions.

In the course of its instructions to the jury, the trial court said:

> "On the trial of this case the Court will instruct you at this time that *there was admitted in evidence testimony relating to transactions had with persons who*

are not named as defendants in this case, or who were not in any manner named in the indictment herein, and the same was admitted in evidence and *may be considered by the jury for the purpose of determining the question of good or bad faith with which representations were made.*"

The court said, further, that such evidence was introduced "as bearing upon the question of the intention of the parties as disclosed by their actions perhaps in other or similar matters." (R. 997.)

Relevant Parts of Statutes Involved.

Title 18, U.S.C.A., Sec. 338, (Criminal Code, Sec. 215):

"Whoever, having devised, or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or without the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States * * * shall be fined not more than $1,000, or imprisoned not more than five years, or both."

Title 18, U.S.C.A., Sec. 88, (Criminal Code, Section 37):

"If two or more persons conspire, either to commit any offense against the United States, or to defraud the United States, in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

Title 15, U.S.C.A., Sec. 77 (b) (1):

"The term 'security' means any note, stock treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, pre-organization certificate or subscription, transferable share, *investment contract*, voting trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a 'security', or any certificate of interest or participation, in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing."

Title 15, U.S.C.A., Sec. 77 q. (a) (1):

"It shall be unlawful for any person in the sale of any securities, by the use of any means or instruments of transportation or communication in interstate commerce, or by the use of the mails, directly or indirectly, (1) to employ any device, scheme, or artifice to defraud * * *."

THE QUESTIONS PRESENTED.

I.

The Court of Appeals below failed to notice and pass upon serious questions of law raised by petitioners, predicating its opinion upon the belief that the entire record demonstrated the guilt of the defendants.

Is it necessary for federal Circuit Courts of Appeal to pass upon substantive questions presented to them for decision as to whether or not the verdict of the jury was ascertained under appropriate judicial guidance, and as to whether or not prejudicial error occurred by reason of violation or disregard of the rules appropriate for federal criminal trials; or is it sufficient to spell out guilt from the record and decide the case on the facts?

II.

Petitioners were charged with conspiracy to commit the offense of devising a scheme to defraud "in the sale of securities, namely, investment contracts," evidenced by warranty deeds in fee simple to land, coupled with a collateral agreement that an oil well would be drilled to test the productivity of the area, which included the conveyed land.

Is such a charge of conspiracy to violate The Securities Act, and is such judgment of conviction sustainable in view of the fact that there is no Congressional definition of "investment contracts", and hence no definition of such *crime* within the language of The Securities Act itself, and in view of the further fact that the sale of the land, coupled

with such collateral promises, was not known to come even within the civil enforcement aspect of The Securities Act until after the decision of this court, which was rendered long after the last of the events for which petitioners were convicted took place?

III.

The verdict of the jury acquitted Mansfield, the principal actor, under substantive Count One, which sets out the details of the scheme and which charges the mailing of a particular letter or document which concededly was mailed by him, and found him guilty on every other count of the indictment, which charges similar mailings, including the eleventh count, which charges him with a conspiracy to commit the offense described in count One. The jury found all of the petitioners herein guilty under count One, as to which they had acquitted Mansfield, but acquitted them on all other substantive counts which were identical except as to the mailing of particular letters or documents, and found them guilty, also, under the eleventh count of conspiring to commit the particular offense described in the preceding substantive counts.

Under such circumstances does the verdict of the jury disclose such a lack of understanding, and is it so repugnant and inconsistent as to require a reversal of the judgment of conviction?

IV.

Petitioners were convicted under count One, which charges them with devising a scheme and with knowingly and wilfully making a particular use of the mails by causing a certain letter with enclosures to be delivered, in execution thereof, (as to which there was no evidence against

petitioners) and they were also convicted under count Eleven, which charges them with conspiring to commit the various offenses described in the preceding ten counts, including the offense charge in count One. The same evidence was relied upon to sustain conviction under both counts.

Does the conviction of petitioners on count One and count Eleven, and their cumulative sentence thereunder, upon the same evidence, constitute a double conviction and punishment for the same offense?

V.

Count One of the indictment, the allegations of which were incorporated in the conspiracy count, charges petitioners with knowingly and wilfully causing to be delivered, through the post office establishment of the United States, a particular letter and enclosure, but there was no evidence that the petitioners participated in, or had any knowledge of, the use of the mails so alleged.

Under such circumstances, is it enough to support the conviction to hold "that the mails were used and that the scheme was one which reasonably contemplated the general use of the mails," and that, therefore, the defendants are guilty of knowing and wilful participation in causing the mailing and delivery of the particular letter as to which they were convicted?

VI.

Is it prejudicial error to admit, over the objections of the defendants on trial, a map of the area in question and testimony as to transactions between customers and strangers to the indictment, in the absence of any evidence that any of the petitioners had any contact, connection

with or knowledge of such map, or of its use, or of such transactions, on the ground that such exhibit and such evidence might be considered by the jury in determining the intent of the defendants on trial?

VII.

Is it prejudicial error, and does it conform to the standards by which guilt is determined in the federal courts, for the trial court to instruct the jury, in effect, that the evidence relating to transactions between buyers of the land and strangers to the indictment, with whom there was shown to be no contract on the part of defendants on trial, and as to which transactions the defendants had no knowledge or connection, on the ground that such evidence could be considered by the jury for the purpose of determining the good or bad faith or intention of the defendants on trial?

Reasons Relied On for Allowance of the Writ.

The following are the special and important reasons why this Court should grand the writ of certiorari:

1. The Circuit Court of Appeals, below, rendered its decision with an opinion which has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such departure by the District Court, as to call for the exercise of this court's power of supervision.

As is evidenced by its opinion, the Court failed to notice, and pass upon, serious questions of law raised by petitioners, predicating its opinion upon the belief that the defendants were guilty on the entire record. The Court concluded its opinion with the language: "We think the verdict was amply warranted by the evidence as to all of

the appellants, and the judgments appealed from are affirmed."

This Court, in *Bollenbach* v. *United States*, 90 L. Ed. 318, held that it is not for Appellate Courts to spell out guilt from the dead record, it being such courts' duty, on review, to determine all questions of prejudicial error, and to discover whether the guilt of the defendants was ascertained by the jury under procedure and standards appropriate for criminal trials in federal courts, under proper judicial guidance."

2. The Court of Appeals rendered a decision upon an important question of federal law which has not been, but which should be, decided by this Court.

The Court of Appeals held that petitioners were guilty of conspiring to violate The Securities Act upon authority of the *Securities & Exchange Commission* v. *Joiner Corporation*, 320 U. S. 344. The Court failed to notice the distinction urged by petitioners between preventive civil enforcement and criminal prosecution for past conduct, a distiction which was noticed by this Court in its opinion in the *Joiner* case (320 U. S., at page 355.) The Court, moreover, failed to consider petitioners' point that under the language of this Court's opinion in the *Joiner* case it is necessary that instruments and transactions "be established in commerce" as investments contracts. Whether or not a given transaction is so established in commerce is a question of fact as to which there was no evidence. The Court failed to notice, also, petitioners' contention that it is for Congress to define crime and specify the offenders, and that the intention of a penal statute must be found in the language used, "interpreted according to its fair and obvious meaning." The

sale of deeds to lands, allegedly coupled with a collateral representation (not timed and contingent upon payment) that a test well would be drilled, is not, "obviously," an "investment contract", as is demonstrated by the fact that the same Court of Appeals in an opinion reversed by this Court in the *Joiner* case, held that such instruments and dealings did not amount to the sale of "investment contracts." It is necessary that this Court supplement its opinion in the *Joiner* case by announcing the law as applicable to criminal prosecutions for violation of the Securities Act.

3. The decision of the Court of Appeals is in conflict with the decision of another Circuit Court of Appeals on a matter of substantial importance. And, in sanctioning the judgment of conviction by the District Court upon the verdict, the decision so far departed from the usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

The verdict of the jury acquitted Mansfield, the principal defendant, under substantive count One, which sets out the details of the scheme and charges, as the particular offense, the mailing *of a certain letter* with an enclosure. Although Mansfield did the mailing, and there is no evidence that any of the other defendants had any knowledge of that act, the jury acquitted Mansfield on count One and found all of the other defendants guilty. Under identical circumstances they found Mansfield guilty on every other count of the indictment, which charges similar mailings, including the eleventh count, which charges him with a conspiracy to commit the offense.

The verdict is, obviously, inconsistent and repugnant. This point, although urged upon the Court of Appeals, was not even noticed.

There is conflict between the decisions of the various Circuits as to the effect of an inconsistent verdict. The Third Circuit, (for example, *Speiller* v. *United States*, 31 Fed. (2) 682, 684), and the Eighth Circuit, (for example, *Peru* v. *United States*, 4 Fed. (2) 881), hold and adopt the view that where there is an acquittal on one count of an indictment and a conviction on another count, charging, in effect, the same crime, and the Government relies upon the same facts to support a conviction on both counts, the verdict of conviction will not be allowed to stand.

The Second Circuit, (for example, *Steckler* v. *United States*, 7 Fed (2) 59), and the Seventh Circuit, (for example, *Carrigan* v. *United States*, 290 Fed. 189), and the Sixth Circuit, (for example, *Gozner* v. *United States*, 9 Fed. (2) 603), hold with the Second Circuit. The Court of Appeals, below, while it did not pass upon this question, by affirming the judgment of the District Court, in effect, joined the Second Circuit.

This question represents an important question of federal law and federal procedure, which should be determined by this Court.

4. The decision of the Court below, in affirming the judgment of conviction by the District Court under counts One and Eleven, under the same evidence, constitutes a double conviction and punishment for what is actually the same offense, and is in conflict with the decision of the Sixth Circuit, and probably the Second Circuit.

Petitioners were convicted under count One, which charges them with devising a scheme and with knowingly and wilfully making a particular use of the mails by causing a certain letter, with enclosure, to be delivered, in execution of the scheme. They were convicted, also, under

count Eleven, which charges them with conspiring to commit the various offenses described in the preceding counts, including the offense charged in Count One. They were acquitted on all other counts. There was no evidence that any defendant (including petitioners) other than Mansfield, participated in, or had any knowledge of, the mailing of what the indictment terms as the gist of the offense, "a certain letter."

The Court below held that "it was enough to show that the mails were used and that the scheme was one which reasonably contemplated the use of the mails." Hence, petitioners were convicted under count One upon the conspiracy concept, and they were convicted under count Eleven upon the same hypothesis. The same evidence was used to sustain the conviction under both counts.

Under the ruling in *Freeman* v. *United States*, 146 Fed. (2) 978 (C.C.A. 6) the judgment of the District Court, in such circumstances, should be reversed. Under the ruling of the Court in *United States* v. *Mazzochi*, et al, 75 Fed. (2) 497 (C.C.A. 2), the verdict of conviction should have been reversed for the additional reason that it is apparent that at the outset of the alleged scheme to defraud (or conspiracy) that no particular mailing could have been specifically in mind, it being obvious that the "conspirators" could not know to whom they would send letters through the mail, and hence they could not be convicted for conspiring to commit the offense charged in count One.

The double conviction and punishment of petitioners, and the now existing conflict of opinion between the Fifth Circuit in the case at bar, and the Sixth and Second Circuits, require review and decision by this Court.

5. In rendering its decision, the Court of Appeals decided the important question of federal law which has not

been, but should be, settled by this Court. The opinion of the Circuit Court of Appeals decided this federal question in a way probably in conflict with what the decision of this Court would be if this Court would pass upon the subject.

Count One of the indictment charges the defendants with knowingly and wilfully causing to be delivered through the post office establishment of the United States, "a certain letter, with enclosure, but there was no evidence that the petitioners, or any of the defendants, except Mansfield, participated in or had any knowledge of, the use of the mails so alleged. The Court below said, "It was enough to show that the mails were used, and that the scheme was one which reasonably contemplated the use of the mails."

Petitioners were not indicted under count One for devising a scheme, the gist of the offense being the particular use of the mails charged in the indictment, the first count alleging: "And the defendants, having so devised, and intended to devise, the aforesaid scheme and artifice, *on or about August* 19, 1941, * * * for the purpose of executing said scheme * * * did *knowingly and wilfully*, fraudulently and feloniously cause to be delivered by mail *a certain letter* and warranty deed, enclosed in an envelope with postage thereon prepaid, etc."

In holding that it was unnecessary to prove this essential allegation, which constituted the offense for which petitioners were convicted under count One, the Court of Appeals treated the charge as surplusage and struck it from the indictment. According to the language of the opinion, proof that defendants devised a scheme which reasonably contemplated, generally, the use of the mails, is the exact equivalent of stating that proof of a conspiracy to use the mails supports the charge of a specific

substantive offense. In other words, proof of a possible general intent sustains a charge and conviction for the specific act charged as the particular crime, done "knowingly and wilfully" and requiring a specific intent. It is believed that this Court should sustain the opinion announced in *United States* v. *Mazzochi*, 75 Fed. (2) 497 (C.C.A. 2), in which it was stated: We have repeatedly expressed our disapproval of cumulating sentences by verbal devices."

The denial of certiorari by this Court in cases where similar questions have been raised has led to the belief that this Court has passed upon the question when it has not, and this denial is used by prosecutors, as it was by the Court, below (See footnote 10 to the opinion), in support of the position that substantive counts in Mail Fraud cases charging one certain use of the mails, need not be proved. In view of the great number of prosecutions under the Mail Fraud Statute, this question should be settled by this Court.

6. The Court of Appeals, by its opinion, has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision as to the propriety of admitting in evidence, in criminal cases, hearsay evidence consisting of a map generally used in the prosecution, and testimony as to transactions with strangers to the indictment, there being no evidence that any of the defendants on trial, including petitioners, had any contact or connection with, or even knowledge of, such map, or of its use, or of such transactions. Such evidence, admitted on the ground that it had bearing on the intent of the defendants on trial, was erroneously admitted because the intent of a defendant

cannot be demonstrated by evidence of documents, acts or transactions of which he possesses no knowledge.

The admission of such hearsay evidence constitutes prejudicial error, according to the decisions of this Court. (*Delaney* v. *United States*, 263 U: S. 586, and cases cited.)

7. The Court of Appeals has so far sanctioned the departure by the District Court from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision for the purpose of determining whether or not a trial judge in a criminal case may properly instruct the jury that evidence (described in the preceding point 6 herein) consisting of exhibits and transactions with which the defendants had no connection and of which they had no actual knowledge, could be considered by the jury for the purpose of determining the good or bad faith or intention of the defendants on trial. The same reasons asserted in the preceding point as to the admission of such evidence, apply with equal force to the consideration of the trial court's instructions, and therefore will not be here repeated.

The Court, below, noticed only petitioners' contention that the trial court committed error in refusing to give special instructions to the jury requested by them, but failed to consider petitioners' argument as to the given instructions. In effect this silent treatment runs counter to the opinion of the Court in *Bollenbach* v. *United States*, 90 L. Ed. 318, where this Court calls attention to the importance of instructions by the trial court to the jury, recognizes the effect upon the minds of the jury of the judge's last words, and condemns the policy of treating such situations as technical or harmless error.

Petitioners respectfully represent that there has been filed in connection with this Petition, a certified copy of

the transcript of the record in the case, including the proceedings in the Circuit Court of Appeals for the Fifth Circuit.

Wherefore, Your petitioners respectfully pray that the Writ of Certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be named herein, a full and complete transcript of the record of all proceedings in the case, entitled "*Frank Mansfield, et al* v. *United States of America,* and docketed in that Court as Docket No. 11366; and your petitioners pray that said judgment of said Circuit Court of Appeals be reversed, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

W. O. BROWNE
E. W. NEGLEY
M. J. DOBSON
MERRILL NEWMAN
MORRIS J. NEWMAN
BEN T. STOWELL,

By David H. Cannon
DAVID H. CANNON,

Theodore E. Rein
THEODORE E. REIN
Their Attorneys.

Certificate of Verification.

State of Illinois,
County of Cook—ss.

Theodore E. Rein, being first duly sworn, deposes and says:

That he is one of the attorneys for W. O. Browne, E. W. Negley, M. J. Dobson, Merrill Newman, Morris J. Newman, and Ben T. Stowell, petitioners in the within and foregoing petition; that he, with David H. Cannon, prepared the within petition and that the matters therein are true as he verily believes, and that the same is not interposed for the purpose of delay.

Theodore E. Rein

THEODORE E. REIN

Subscribed and sworn to before me this 31st day of July, 1946.

Hester L. Schaffer

Notary Public in and for the State of Illinois, County of Cook.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Introductory

Unless the present application for the writ of certiorari is allowed, petitioners, because of the failure of the Circuit Court of Appeals to consider serious questions of prejudicial error presented to it for decision, will suffer a complete denial of justice. The Court below largely contented itself with a consideration of the cold record in determining whether or not petitioners were guilty under all of the facts, disregarding the question as to whether or not the verdict and judgment were the result of correct application of substantive rules of law and of evidence.

Opinion of the Court Below.

The opinion of the Court below was rendered and filed May 23, 1946. It has not yet been printed in the Federal Reporter (2nd Series), but it is set out in the printed record at pages 1184-1189.

Statement of Grounds on Which the Jurisdiction of This Court Is Invoked.

Jurisdiction is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, (43 Stat. 938; Tit. 28 U.S.C.A. 347,) and also under the Act of March 8, 1934, and the Rules of Practice and Procedure after plea of guilty, verdict or finding of guilt, in criminal cases brought in the District Courts of the United States and in the Supreme Court of the District of Columbia, promulgated May 7, 1934.

The opinion of the Circuit Court of Appeals for the Fifth Circuit was filed May 23, 1946 (R. 1184); petition for rehearing was filed June 13, 1946 (R. 1192); and such petition for rehearing was denied July 2, 1946 (R. 1195.)

Statement of the Case.

To avoid repetition, the Statement of the Case in the petition for writ of certiorari is hereby adopted. Such other facts as are incidentally necessary to be considered by the court in connection with the questions raised on this application, will be pointed out at the proper place in the ensuing argument.

Specification of Errors Intended to Be Urged.

1. The Court of Appeals erred in failing to consider the substantial questions raised by petitioners, and in basing its opinion upon the belief that the accused were guilty

on the entire record, leaving untouched the question as to whether or not the guilt of the defendants was ascertained in accordance with the required standards, and under appropriate judicial guidance.

2. The conviction of petitioners for conspiring to violate The Securities Act in selling land, on the ground that such sale and conveyance were accompanied by a collateral oral representation that a test oil well would be drilled somewhere on the tract, is erroneous, because the language of The Securities Act contains no congressional definition of the term "investment contract", the definition of which was left to the determination and decision of this Court in an opinion rendered long after the facts charged in the indictment took place. In this connection *there was error in failing to distinguish between applying preventive legal processes to future operations in the sale of securities, and punishing criminally for past operations,* before the terms of the statute are defined, leaving the law on which the petitioners were convicted doubtful, until resolved by this Court.

3. There was error in entering the judgment upon the verdict of the jury which disclosed complete lack of understanding and is irreconcilable, repugnant and inconsistent and the Court of Appeals erred in affirming such judgment.

4. The conviction of petitioners under count One, which charges them with the devising of a scheme, and with knowingly and wilfully making a particular use of the mails in the execution thereof, and their conviction under count Eleven, which charges them with conspiring to commit the offenses described in the first count and in the subsequent substantive counts (the same evidence being relied upon to sustain conviction under both counts) constitutes a double conviction and punishment for what is essentially the same offense, and is erroneous.

5. The Court of Appeals, affirming the judgment of the District Court, erroneously held that a substantive count of an indictment charging the violation of The Mail Fraud Statute by the knowing and wilful mailing of a particular letter, may be sustained by proof that the scheme reasonably contemplated the use of the mails.

6. The admission in evidence of a map of the area in question, and of testimony as to transactions between customers and strangers to the indictment, in the absence of any evidence that any of the petitioners had any contact or connection with, or knowledge of, such map, or of its use, or of such transactions, on the ground that such exhibit and such evidence might be considered by the jury in determining the intent of the defendants on trial, constitutes prejudicial error.

7. The instruction of the trial court to the jury to the effect that evidence relating to transactions between buyers of the land and strangers to the indictment, with whom there was shown to be no contact on the part of defendants on trial and as to which the defendants had no knowledge or connection, could be considered by the jury for the purpose of determining the good or bad faith or intention of the defendants on trial, constitutes prejudicial error.

SUMMARY OF ARGUMENT.

I.

The Court of Appeals erred in failing to consider and decide the substantial issues raised before it by petitioners.

Many of the questions presented to the Court of Appeals by petitioners went unnoticed.

Some of the arguments were dismissed with an insufficient word.

The Court failed to consider and decide whether guilt of the accused was ascertained in accordance with standards and procedure appropriate for criminal trials in federal courts and under proper judicial guidance.

The opinion concerned itself primarily with a review of the evidence, and stated that it thought "the verdict was amply warranted by the evidence." The decision of the Court is in conflict with the decision of this Court in *Bollenbach* v. *United States*, 90 L. Ed. 318.

II.

Petitioners should not have been indicted, prosecuted and convicted for conspiring to violate the Securities Act in selling land, even though such sale and conveyance were accompanied by a collateral, oral, representation that a single, test oil well would be drilled somewhere on the tract of the land from which small parcels were sold to the public.

Petitioners were convicted under the conspiracy count, which charged them with violation of the Securities Act, and which adopts all of the substantive counts of the indictment charging violation of the Securities Act.

The Court below held that the sale of land by warranty deed, which sale was attended by representation that a well would be drilled somewhere on the tract, constituted the sale of an "investment contract", which is defined in the

Securities Act (Section 77 (b), Title 15 U. S. C. A.), as a security.

The Court of Appeals relied for its decision upon *S. E. C.* v. *Joiner Leasing Corporation*, 320 U. S. 344, and failed to notice that the *Joiner* case is not controlling upon the case at bar, for the following reasons:

In the *Joiner* case the sale of the assignments of oil leaseholds were accompanied by a collateral agreement for the drilling of wells, which drilling was "timed and contingent" upon payment of the acreage purchased. There is no such agreement here;

The *Joiner* case held that in those instances where the subject of sale does not fall within the recognized classification of instruments known as "securities", they may be regarded as securities under the statute if their character is established in commerce as such; [There was no evidence upon this subject in the case at bar.]

In the *Joiner* case this Court recognized the distinction between a proceeding for the civil prevention of future sales and criminal prosecutions for past conduct, a distinction which was not observed by the Court of Appeals;

All of the printed literature shown to customers at the time of the several transactions advised that the tract was sold without any development program whatsoever.

Exhibit G56 (R. 1073-1078.)

The term "investment contract" was not defined by Congress and was not defined by this Court until November, 1943, ten years after the passage of the Act and two years after the last of the events charged in the indictment took place. This results in an *ex post facto* conviction.

It is for Congress alone to define crime and to specify the offenders.

United States v. *Wiltberger*, 5 Wheat. 76, 96.
United States v. *Harris*, 117 C. C. A. 5, 309.
Sarles v. *United States*, 152 U. S. 570, 575.

The intention of a penal statute must be interpreted according to its fair and obvious meaning.

United States v. *Harris*, 177 U. S. 305, 309.

The term "investment contract" did not obviously include such transactions as are involved in the case at bar, because even the Judges of the Court of Appeals for the Fifth Circuit, as is evidenced by their opinion in the *Joiner* case, did not believe that the sale of leaseholds or assignments of leaseholds, coupled with a collateral agreement to drill a well, came within the civil aspects of the law, until it was reversed by this Court.

This is a grave question of general importance in criminal prosecutions for violations of the Securities Act, and should be finally decided by this Court.

III.

The verdict of the jury discloses such a lack of understanding, and is so repugnant and inconsistent, as to require the reversal of the judgment of conviction.

The jury acquitted the principal defendant under count One, which charges the devising of the scheme as the genesis of the offense and the mailing of a particular letter as the gist of the offense, but convicted all of the petitioners on the same count, even though only Mansfield had anything to do with the mailing of the count letter and even though none of the petitioners was connected with the mailing or with knowledge of the particular mailing.

Mansfield was convicted under all of the other substantive counts under identical circumstances.

Although Mansfield was acquitted under the count charging him with the mailing of the letter in count One, he was convicted for conspiring to mail the same letter under the charge in the indictment that he conspired to commit the offense set forth in the preceding substantive counts.

There is nothing in the evidence to distinguish Mansfield's activities either in the devising of the scheme or in

the use of the mails under the first count, from his activities under the subsequent substantive count.

There was no mistake by the jury in the preparation or signing of the verdict, because they heard their verdict read in open court and made no comment. (R. 149.)

There is conflict as to the effect of inconsistent verdicts, the Third Circuit holding that where there is an acquittal on one count and a conviction on another, charging in effect the same crime and supported by the same evidence, such verdict should not be allowed to stand. The Second, Sixth and Seventh Circuits seem to endorse a contrary view.

An inconsistent verdict, which is also a confused verdict, should not be confirmed by judgment.

IV.

The conviction of petitioners under count One, which charges them with devising a scheme and with knowingly and wilfully making one particular use of the mails in execution thereof, and their conviction under count Eleven,, which charges them with conspiring to commit the various offenses described in the first count and the subsequent substantive counts, the same evidence being relied on to sustain the conviction under both counts, constitutes a double conviction and punishment for what is essentially the same offense.

There is no evidence that petitioners participated in the particular use of the mails specified in count One or in any of the other substantive counts.

The Court below, speaking of the conspiracy count, said that intent to use the mails may be inferred "where the accomplishment of the conspiracy contemplates the use of the mails." Speaking of the substantive counts, the Court said:

> "It is enough to show that the mails were used and that the scheme was one which reasonably contemplated the use of the mails."

There being no evidence of participation in the mailing, or knowledge of the mailing, charged in count One, petitioners were convicted of a scheme to use the mails under that count, and of conspiring to use the mails under the conspiracy count.

The same evidence was used by the Government to support both convictions. The result is that petitioners were punished twice for what was essentially the same offense, and upon the same evidence.

The opinion of the Court below is in conflict with the opinion of the Cricuit Court of Appeals for the Sixth Circuit and Second Circuit.

Whenever it appears that proof of one offense proves every essential element of another growing out of the same act, the Constitution limits the punishment to a single act.

Freeman v. *United States,* 146 Fed. (2d) 978, 979 (C.C.A. 6).

U. S. v. *Mazzochi,* 75 Fed. (2d) 497, 498, 499 (C. C.A. 2).

V.

The Court of Appeals erroneously held that a substantive count of an indictment charging the violation of the Mail Fraud Statute by the mailing of a particular letter, may be sustained by proof "that the mails were used, and that the scheme reasonably contemplated the use of the mails."

Indictments charging a particular use of the mails as constituting the violation of the Mail Fraud Statute must be supported by proof beyond a reasonable doubt that the defendant participated in the particular act of mailing, and knowingly and with express intention caused the mails to be used as to that isolated instance with which he is specifically charged.

Count One, under which petitioners were convicted, charged the statutory offense in the language: "For the purpose of executing the said scheme and artifice and attempting so to do, knowingly, wilfully, fraudulently and

feloniously, caused to be delivered by mail, a certain letter." The indictment specifies the date of the letter, the date of delivery, and the addressee.

The Court, below, held that "it was not necessary to show intent in connection with the substantive counts of the indictment, and that it was enough to show that the mails were used and that the scheme was one which reasonably contemplated the use of the mails."

The opinion of the Court, below, treats the charging part of substantive Count One virtually as surplusage.

In holding that the offense of mailing a particular letter knowingly and wilfully is supported by proof that the defendants were in a scheme which reasonably contemplated the general use of the mails, the Court renounced the requirement of proof beyond a reasonable doubt, and transposed the presumption of innocence into the presumption of guilt.

In effect, under the opinion of the Court below, the defendants were convicted, not for the particular offense of mailing, or causing to be mailed, one certain letter, but for conspiring, generally, to use the mails.

The conviction of petitioners in the absence of actual participation in, or knowledge of, the mailing of the count letter, makes them responsible for the act of a co-conspirator, and is sustainable only under the conspiracy concept of the law and of the evidence.

VI.

The admission in evidence of a colored map of the area in question, in the absence of any evidence whatsoever that petitioners had any contact or connection with, or knowledge of, such map, or of its use, on the ground that such exhibit might be considered by the jury in determining the intent of the defendants on trial, constitutes highly prejudicial error which, although argued to the Court of Appeals, was not noticed by that court.

The District Court admitted in evidence a map, Govern-

ment Exhibit 100, and testimony as to transactions between strangers to the indictment and buyers of the land. Petitioners had no connection with, or knowledge of, said map or its use or of said transactions. The trial court admitted this evidence, upon the ground that it had bearing on the intention of the parties on trial.

Such evidence could have no bearing on the matter of the intent of the defendants if they had no actual knowledge thereof, and the evidence was palpably improper, being pure hearsay as to petitioners.

Even the Court of Appeals, below, fell into the error of considering the map against the defendants, stating that they used "fraudulent maps" in making sales.

This Court has held that the admission of hearsay evidence against a defendant in a criminal case constitutes reversible error.

Delaney v. *United States*, 263 U. S. 586.

The Court of Appeals gave no consideration to the question of the admissibility of this evidence.

VII.

The instruction of the trial court to the jury, to the effect that evidence relating to transactions between buyers of the land and strangers to the indictment with whom there was shown to be no connection on the part of defendants on trial, and of which transactions the defendants had no knowledge or connection, could be considered by the jury for the purpose of determining the good or bad faith or intention of the defendants on trial, constitutes error of a highly prejudicial nature.

The trial court instructed the jury that testimony relating to transactions had with persons who are not named as defendants, might be considered by the jury for the purpose of determining the question of the good or bad faith or intention with which representations that relate to the offenses charged in the indictment, were made, *as*

bearing upon the question of the intention of the defendants on trial. (R. 997.)

The instruction is self-condemnatory. All of the reasons asserted in the foregoing point VI are applicable to this point, VII.

Instructions by the trial court to the jury are of the utmost importance. An erroneous instruction upon a vital subject may be the very cause of the guilty verdict.

The Court of Appeals, below, did not notice, but should have noticed, and reviewed this point.

Bollenbach v. *United States,* 90 L. Ed. 318.

ARGUMENT.

I.

The Court of Appeals erred in failing to consider and decide the substantial issued raised before it by petitioners.

It is apparent from the opinion of the Circuit Court that it did not seriously consider the substantial questions raised by petitioners, but, instead, based its opinion on the belief that the accused were guilty, spelling out guilt from the record and leaving untouched the question as to whether or not the guilt of the defendants was ascertained in accordance with the standards by which guilt is determined in federal courts, and as to whether or not the verdict of the jury was ascertained under appropriate judicial guidance.

The opinion of the court below, except for a few cursory lines, is devoted entirely to a consideration of the evidence. All of the foregoing assignments of error were carefully argued and they were of such seriousness as to merit the closest attention, but they were either dismissed with a word or not noticed at all.

The Court concluded its opinion with the words, "We think the verdict was amply warranted by the evidence as to all of the appellants, and the judgments appealed from are affirmed."

This case is another example, therefore, of the situation before this Court in *Bollenbach* v. *United States,* 90 L. Ed. 318 (Feb. 11, 1946). It presents another and similar occasion for the exercise of this court's power of supervision, and calls again upon the Court to disapprove judgments of conviction and affirmances of judgments of conviction which result from a trial which departs from the accepted course of judicial proceedings "under standards appropriate for criminal trials in federal courts."

In the *Bollenbach* case, the trial judge, in response to a question by the jury, while it was deliberating, gave to them a spontaneous but misleading instruction. This, it was urged by the Government, was a technical error, the verdict of the jury being amply justified by the evidence. This Court, observing the tendency of appellate courts to look at a case so broadly that they fail to see important objects in the field of inquiry, applied the brakes to the downward momentum by reminding that "the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts".

To perceive the inadequacy of the opinion of the court below this Court has only to contrast it with its own language in the *Bollenbach* case. There the Court said:

> "In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for establishment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be."

Whether the questions raised by petitioners before the Court of Appeals involve but trivially technical and unmeritorious deviations from the "best practice", or transcend mere formalism and present issues which should have been examined and correctly decided, depends, of course, upon the validity of the succeeding points of this brief. The failure of the Court of Appeals, however, to consider the susbtantial contentions of petitioners is the separate, individual error of the Court of Appeals which should be examined and disapproved by this Court.

II.

Petitioners should not have been indicted, prosecuted and convicted for conspiring to violate the Securities Act in selling land, even though such sale and conveyance were accompanied by a collateral, oral, representation that a single, test oil well would be drilled somewhere on the tract of the land from which small parcels were sold to the public.

It is of the utmost importance, it is submitted, for this Court to announce whether, under the circumstances at bar, a prosecution may be commenced, and men may be convicted, for a conspiracy to violate the provisions of an Act of Congress which needed clarification and construction by this Court, even as to its civil enforcement.

Petitioners were convicted under count Eleven of the indictment which charged all of the defendants named with unlawfully and knowingly conspiring among themselves to commit the various offenses against the United States which are fully described and set out in the first ten counts. (R. 45.) Of these, substantive counts One to Five charge violations of the Mail Fraud Statute, and counts Six to Ten charge violations of the Securities Act. The conspiracy count thus adopts all of the charges set forth in those counts which allege violation of The Securities Act.

Count Six of the indictment is the first substantive count under the Securities Act. It alleges that the defendants, having devised the scheme described in count One, "unlawfully and knowingly, in the sale of securities, namely, investment contracts evidenced by four certain warranty deeds, purporting to convey, in fee simple, certain lands in Brewster County, Texas, coupled with collateral agreements, promises and undertakings, that is, that an *oil well would be and was being drilled in order to test and prove the productivity of the area surrounding the well for oil,* including the lands conveyed, or purported to be conveyed by said warranty deeds, by the use of the United

States mails, was in the manner following, to-wit: That at the time and place aforesaid, said defendants, acting together, jointly and severally, unlawfully and knowingly caused said warranty deeds to be delivered by mail * * * (R. 23-24.)

Counts Six to Ten are identical except as to the documents alleged to have been delivered by mail.

Section 77 q, Title 15, USCA, provides that it shall be unlawful "for any person in the sale of any securities by the use of any means or instruments for transportation or communication in interstate commerce, or by the use of the mails, directly or indirectly—(1) to employ any device, scheme or artifice to defraud, or (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material and necessary fact, in order to make the statements made, in the light of the circumstances under which they were made, not misleading * * *"

The term "security" is defined in the statute as follows:

> "The term 'security' means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, pre-organization certificate or subscription, transferable share, *investment contract,* voting-trust certificate, certificate of deposit for security, fractional undivided interest in oil, gas or other mineral rights, or, in general, any interest or instrument commonly known as a 'security', or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant, or right to subscribe to, or purchase, any of the foregoing." (Section 77b, Title 15, USCA.)

The Government contended that the defendants Browne, Negley, Dobson, Barnett, Stowell, Merrill Newman and Morris J. Newman were not convicted under any of the substantive Securities Act counts, and that, therefore, this argument on their behalf is moot or otherwise improper. These defendants were convicted, however, under the con-

spiracy count which charges them with conspiring to commit the several Securities Act violations charged in counts Six to Ten. To this the Government replies that the conspiracy count charged a conspiracy also to commit five mail fraud offenses, that they were convicted of one such offense and that it is enough to find that they conspired to commit any one of the ten offenses charged in the preceding counts. This position is untenable because, submitted as the case was, it is impossible now to say that the jury considered these defendants guilty of conspiring to commit only the offense charged in count One, when the Conspiracy Count specifically alleged that the defendants conspired to commit all of the acts charged in the preceding ten counts, and the verdict found them guilty under that count as it was pleaded.

The argument successfully advanced by the Government below is equivalent to contending that the conspiracy count charged, in effect, that the defendants conspired to commit the offense described in count One, or in count Two, or in any of the other substantive counts, or the offenses described in all of the substantive charges. Such extremes of alternative pleading, in the nature of things, do not afford to a defendant in a criminal case the fair trial guaranteed under the Constitution.

Especially is it impossible to segregate, at this time, various conceivable conclusions of the jury in the light of the trial court's instructions which describe and explain the counts charging offenses against The Securities Act. (R. 990)

The Securities Act and its violation were thus prominently placed before the jury which, as has been said, returned a verdict of guilty on the conspiracy count, which included violations of the Securities Act. It is believed, therefore, that the Securities Act is sufficiently involved in this case as to require its construction and application in connection with the conviction of the present petitioners.

As its title implies, the Securities Act is concerned with

the sale of securities. Land has never been regarded as a security in the commonly accepted sense of that term. While every consideration of public protection may require a radical broadening of the traditional concept of securities in order to prevent, by the injunctive process, fraudulent promotions consisting of the sale of land coupled with collateral agreements to drill wells or otherwise develop tracts sold to the unwary in small parcels, nevertheless, even more solemn considerations of the administration of justice should require that men may not be prosecuted and punished by imprisonment where the statute sought to be violated does not clearly specify such transactions as coming within its scope, and where the final decision by this Court as to the civil enjoinability of transactions involving the sale of assignments of oil leases coupled with a collateral promise, was not rendered until long after the present, challenged events took place.

This Court decided the case of *Securities & Exchange Commission* v. *C. M. Joiner Leasing Corporation,* 320 U. S. 344, in November 1943, two years after the last of the events transpired which are charged as criminal violations of The Securities Act.

There can be no crime without criminal intent. Petitioners here cannot be said to have conspired to violate The Securities Act if they did not, and could not, know that the statute included conveyances of land coupled with a collateral agreement to drill one test well somewhere on the tract. The same Circuit Court of Appeals which affirmed the instant conviction did not know that such transactions fell within the purview of the Act until it was reversed by this Court in the *Joiner* case. Prior to such reversal the Court of Appeals for the Fifth Circuit held that even civil, injunctive processes were not open to The Securities & Exchange Commission for the purpose of preventing such transactions. (133 Fed. (2) 241)

Nowhere in the statute is the term "investment con-

tract" defined. The Court of Appeals, agreeing with the Government in its contentions, held that the decision of this Court in *Securities & Exchange Commission* v. *C. M. Joiner Leasing Corporation*, 320 U. S. 344, is controlling on the question under discussion.

In the *Joiner* case the Commission sought to enjoin the sale of unregistered assignments of oil leasehold interests, which were personal property, possessing no conveyability other than as oil leases. There was no title in fee simple. This Court held that such assignments, under the particular provisions thereof, came within the term "investment contract." The Court's attention is particularly called to the language appearing at page 349 of its opinion, which reads:

> "But, at any rate, the acceptance of the offer made a contract *in which payments were timed and contingent upon completion of the well,* and *therefore,* a form of investment contract in which the purchaser was paying both for a lease and for a development project."

There is no true similarity between such a contractual situation and the conveyance of land in the case at bar. Here there is involved a transaction contemplating an outright deed to land, payment for which was not 'timed' and 'contingent' upon the 'completion of the well', as in the *Joiner* case.

This Court said that the reach of the Act does not stop with the obvious and commonplace and that "novel, uncommon or irregular devices, whatever they appear to be, are also reached if it be *proved, as a matter of fact,* that they are widely offered or dealt in under terms or courses of dealing *which establish their character in commerce as* an 'investment contract', or as any interest or instrument commonly known as a 'security.' "

Under this language of the court, the question as to whether or not the deeds in the instant case, under the circumstances under which they were delivered, consti-

tuted investment contracts, is a question of fact, to be proved like any other fact. No evidence whatsoever was introduced by the Government to the effect that land sold by warranty deed, accompanied by a representation that a test well would be drilled somewhere on the tract, constituted such "widely offered or dealt-in" transactions as to establish their character in commerce as "investment contracts."

It is one thing for the Securities and Exchange Commission to enjoin the sale of unregistered securities to prevent fraud, or the danger of fraud, upon the buying public. It is quite another thing, however, to prosecute men criminally for selling deeds to land, in the course of which transactions a representation is made that a test well would be drilled, upon the theory that such transactions constituted the sale of investment contracts.

This Court, in its opinion in the *Joiner* case, expressly recognizes the difference between a civil action and a criminal proceeding in the degree of proof required. The Court said at page 355:

> "It would be necessary in any case for any kind of relief to prove that documents being sold were securities under the Act. In some cases it might be done by proving the document in itself, which on its face would be a note, a bond, or a share of stock. In others proof must go outside the instrument itself as we do here. Where this proof is offered in a civil action, as here, a preponderance of the evidence will establish the case; *if it were offered in a criminal case, it would have to meet the stricter requirement of satisfying the jury beyond reasonable doubt.*"

There was not a scintilla of evidence tending to show that the transactions in question "were established in commerce" as investment contracts. The trial court assumed, in its instruction to the jury, that the deeds plus a vague, collateral representation that one test well would be drilled, amounted to the sale of an investment contract. Under the

decision in the *Joiner* case there should have been proof beyond reasonable doubt that such instruments and transactions were commonly known as "securities" and constituted, in commerce, investment contracts. This must be so, for otherwise the question as to whether or not the contract or transaction is a security will be left for decision in each case where criminal violation is charged. That which constitutes "crime" must be defined in advance.

In governmental bureaus like the Securities and Exchange Commission and the Federal Trade Commission, such agencies should be allowed to cope with ever-changing ingenuities which seek escape from the securities law, and with methods of competition in commerce which change with the times. This is the function of these bodies as protectors of the public interest. In the absence, however, of clear legislative definition, to contend on a criminal trial that such transactions were 'commonly known' as securities or were 'investment contracts', without proof as to what was the 'common knowledge', or common course of trade, is to urge conviction *ex post facto.*

In addition to the line of demarcation which should be drawn between criminal and civil cases arising out of violations or threatened violations of The Securities Act, the asserted difference between the facts in the *Joiner* case and the facts in the instant case is made instantly manifest by the descriptions and explanations of the land being sold, which were contained in all the printed forms of agreement used by all of the defendants. The following is an exact quotation which was contained in all the printed forms of agreement used by petitioners. It is inserted at this point instead of in an appendix, for the convenience of the court. This excerpt is taken from one used by petitioner Merrill Newman in a sale made to one Arbuthnot, and appears as Exhibit "G56" at pages 1073-1078 of the printed record:

"Subdivider (Mansfield) advises that this tract is sold

as raw land without any improvements or development program whatsoever. The land is located in the southwestern part of Brewster County, Texas, close to the Rio Grande and Mexican Border, in what is known as the Big Bend Country. This land is reached by military road approximately 85 miles south of Alpine, Texas, the nearest paved highway. This road, while rough, is passable at most seasons of the year. The land is extremely rough, appears to be badly faulted, and is spotted with volcanic plugs and lava flow. The country is practically unsettled and the surface of the land is of little value for any purpose, there being only sparse desert growth. Most of the land in this project is inaccessible except to a traveler on foot or horseback. The area is practically uninhabited, except at the quicksilver mining town of Terlingua, located from 3 to 20 miles from the various portions of this project.

• • •

"Geologically, this area consists of sedimentary rocks, intruded by igneous formations. In the spots where these intrusives of lava flows occur, the prospects of discovering oil and gas are decidedly unfavorable. • • • Little or nothing, however, is known regarding the mineral possibilities of the land in this project, and while the general area has some value as mineral prospect land, the location of minerals would be due purely to chance. While some of this land is located in small valleys other parts are located on practically inaccessible mountain peaks. Various showings of oil have been encountered in wells drilled several miles to the north of this project in an area known as Green Valley. This Valley, however, differs in character from the land in this project.

• • •

"The prospective purchaser should realize that any estimation of the amount of minerals recoverable should not necessarily be considered reliable or accurate, and any estimation of minerals recoverable from other tracts used for comparative purposes should be totally disregarded as a basis for investing in this tract."

In point of fact, even the Securities & Exchange Commission did not know whether assignments of oil leases, coupled with promises to drill wells, *in the civil aspect of such transactions,* constituted "securities" or amounted to investment contracts, until this Court, in the *Joiner* case, decided the question in November, 1943, two years after the last of the events transpired which are charged as criminal violations of the Securities Act.

Whether the sale of land by warranty deed, and the representations as to the drilling of one test well (which was actually drilled), amounted in law to the sale of a security and came within the purview of the criminal provisions of the Act, is not answered by the language of the statute itself. It is only by judicial interpretation that such transactions could, by any possibility, be said to fall within the scope of the law. Criminal offenses cannot be so created. If the opinion of the court below in the *Joiner* case had been sustained, petitioners could not have been found guilty of violating The Securities Act or of conspiring to violate it.

It is respectfully urged that men should not be prosecuted criminally for the commission of acts as to which even the civil aspects thereof remain in doubt from the time of the passage of the statute (May, 1933), to final decision by this Court (November, 1943), a period of over ten years. Congress alone, this Court has often decided, has the power to define crime and to specify the offenders.

In *United States* v. *Wiltberger,* 5 Wheat. 76 (a case cited by this Court in the *Joiner* case, at page 354 of the opinion), Chief Justice Marshall said (at page 96): "To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated."

Judicial decisions—even the announcement of statutory policy and purpose—are not constitutional substitutes for the requirements that the legistlature, specify with reasonable certainty those individuals it desires to place under the interdict of any Act.

In *U. S.* v. *Harris,* 177 U. S. 305, the court, in considering the applicability of a penal statute to federal receivers, said, "Giving all proper force to the contention of the counsel for the government, that there has been some relaxation on the part of the courts in applying the rule of strict construction to such statutes, it still remains that the intention of a penal statute must be found in the language actually used, *interpreted according to its fair and obvious meaning.*" (p. 309.)

Certainly, the term "investment contracts" cannot be said "fairly and obviously" to mean or to include the sale of land coupled with a collateral representation as to the drilling of a well for the purpose of ascertaining the productivity of the area, when it is remembered that there was sharp disagreement on this subject between judges. Yet petitioners, all laymen, are charged, in effect, by the opinion of the Court below with possessing knowledge of the future interpretation of the Act by the Supreme Court of the United States in the *Joiner* case.

As this Court said in *Sarles* v. *U. S.,* 152 U. S. 570, 575, "There is danger of substituting for the meaning of a statute according to the popular and received sense, the conjecture of judges as to a supposed mischief to be corrected."

It is submitted that the judgment of conviction under the conspiracy count, which included the charge of conspiring to violate The Securities Act, should have been reversed by the Court of Appeals. The question is one of sufficient gravity and national importance to require consideration and final decision by this Court.

III.

The verdict of the jury discloses such a lack of understanding, and is so repugnant and inconsistent, as to require the reversal of judgment of conviction.

The verdict of the jury upon which the judgment of conviction was rendered is so irreconcilably inconsistent, or, as it is sometimes termed, repugnant, that it discloses either a strange compromise or, what is more likely, a complete lack of understanding of the charges against the defendants on trial and of the evidence submitted by the Government in support of the indictment. The point was strongly urged upon the Court of Appeals, but, as will be perceived from the opinion, that court did not even notice that the point was being made.

The jury acquitted Frank Mansfield, the principal actor, under substantive count One, which is the principal count of the indictment. This is the count which sets out the details of an alleged scheme to defraud and charges the mailing by the defendant of a particular letter in execution of the plan. (Letter dated August 18, 1941, R. 19.) All of the other counts of the indictment adopt the allegations of the first count as to the description of the scheme, and, except as to the conspiracy count, add only the formal sentences or paragraphs necessary to charge separate uses of the mails in violation of the Mail Fraud statute and of The Securities Act. The conspiracy count (eleventh) charges that the defendants conspired to commit the various offenses against the United States which are set out in the first ten counts, which, of course, include Count One. (R. 45.)

In the first count is pleaded the essential reprehensible conduct of the defendants. In the first count, also, the unlawful intent is pleaded and described. Therefore, without proof of the facts charged in count One, all of the other counts would fail. It pleads the scheme and a particular use of the mails by Mansfield, the first named and the

principal defendant who signed and sent the letter of August 18, 1941, which constitutes the gist of the offense charged in the first count. And yet Mansfield, the originator of the enterprise, without whose presence and activity there would have been no scheme and no offense, was found "not guilty" on the first count, while all of the other defendants, including petitioners, herein, although there was no proof of participation in the mailing, or in the causing to be mailed, of the count letter of August 18, 1941, were found "guilty" under the first count.

Inconsistency in the verdict is further demonstrated by the fact that Mansfield, under allegations identical with those of the first count, (except that he signed and sent other similar letters and documents through the mails) was found guilty on all of the other substantive counts. Petitioners, however, whose participation in the enterprise was the same under all substantive counts, were found not guilty under the other substantive counts.

They were found guilty, however, under the conspiracy count, which charges them with conspiring to commit the offenses described in all of the ten preceding substantive counts.

Since the offense charged in the first count is a particular use of the mails in execution of a scheme to defraud, it must be apparent that if Mansfield was not guilty under count One, none of the other defendants could be found guilty under that count. As has been said, Mansfield was found guilty on the conspiracy count, which charges him, among other things, with conspiring to commit the offense charged in count One. Yet, although it was he who signed and sent the Count One letter, he was found not guilty on that first count.

Thus, there is demonstrated on the face of the verdict, hopeless uncertainty and confusion in the minds of the jurors, and, it is submitted, the liberty of citizens cannot

be protected and preserved where uncertainty and confusion exist in the minds of the finders of the facts.

Mansfield, the first named defendant, is alleged in the first count, and by reference in all other counts, as the originator of the scheme and the wholesaler of the land. He is included as one of the defendants in every paragraph of the indictment. It is on his letterhead that the indictment letter of the first count was written, and it was he who signed it, as, indeed, he did every other letter and document which was pleaded in the several counts. There is nothing in the evidence to distinguish Mansfield's activities, either in the scheme or in the use of the mails, under the first count, from his activities under the subsequent counts, and there is nothing in the record to distinguish his part in the scheme itself, between the first and the other counts. The verdict of not guilty as to him renders the conclusion compulsory that the jury believed he was innocent of the devising of the scheme, in execution of which the use of the mails was charged.

There was no mistake on the part of the jury in the preparation or signing of the verdict in finding him not guilty because they heard their complete verdict read in "open court by the proper officer, the defendants and their counsel being present." (R. 149) Not one of the twelve jurors called attention to the possibility of mistake, and neither the judge nor the prosecutor made any comment. Under the circumstances there is high suspicion that the result achieved by the jury was a compromise verdict, which should have no place in criminal trials in the federal courts, where guilt must be determined beyond reasonable doubt.

There is conflict as to the effect of inconsistent verdicts in the decisions of Courts of Appeal of various Circuits, which should be now terminated and the question finally resolved by this Court.

While, as has been said, there are cases which hold that

inconsistency in verdicts will not render them void, such cases do not involve what is virtually a single count, repeated in its every allegation which charge the essence of the offense. Without those requisite allegations of the first count, each subsequent count would be a nullity. The Government, except as to the pure formalities of mailing, relied upon the same evidence to support its case on all counts. This is of controlling importance, because the Court will look for actual inconsistency uninfluenced by technical ceremonials.

In *Speiller* v. *United States,* 31 Fed. (2d) 682 (CCA 3), the Court said at page 684:

> "In the instant case, the verdict of guilty on the first count is not based on other evidence than that on which the jury found the defendant not guilty on the second count. *The government relied upon the same facts to support a conviction in both counts.* In the second count, the jury said, in substance, that these alleged facts are not true; they have no legal existence. Where there is an acquittal on one count of an indictment, and a conviction on another count, charging the same crime, the verdict of conviction will not be allowed to stand unless supported by evidence other than that on which the acquittal was based. *Peru* v. *United States,* 4 F. (2d) 881 (CCA 8); *Murphy* v. *United States,* 18 F. (2d) 509 (CCA 8); *Boyle* v. *United States,* 22 F. (2d) 547 (CCA 8.) We are aware that the Circuit Court of Appeals for the Second Circuit has taken a different view in the cases of *Steckler* v. *United States,* 7 F. (2d) 59, and *Seiden* v. *United States,* 16 F. (2d) 197. The Seventh and Sixth Circuit Courts of Appeals in the cases of *Carrignan* v. *United States,* 290 F. 189, and *Gozner* v. *United States,* 9 F. (2d) 603, agree with the Second Circuit, but with great respect we are constrained to differ with them. *When the liberty of a citizen is at stake, a jury will not be permitted to make a plaything of the verdict and blow hot and cold at the same time.*" (Italics supplied.)

As will be perceived, the Court of Appeals for the Third Circuit noted the disagreement among the circuits in its

opinion, and, it is believed, pointed the way to the correct doctrine.

Borrowing the language of the Speiller opinion, the jury in the instant case certainly "blew hot and cold". One conclusion, at least, is inescapable from this strange and incongruous verdict—the jury did not understand the case. The confusion implicit in the verdict may have resulted from the complex indictment, the long trial, the hearing of many witnesses, the introduction of a cartload of exhibits, the attempted proof of different crimes under one count, the admission of evidence of activities on the part of strangers to the indictment as bearing on the question of intent, or from the instructions of the court. Whatever may have been the cause, the verdict is utterly inconsistent.

No reasons of policy in affirming convictions, whenever, under some tenuous, judicial philosophy affirmance is possible, should move this Court to deny the prayer for the writ of certiorari. It is respectfuly urged that the time is here for the courts to restrict, reasonably, the boundaries of permissible error and inexactnesses in criminal trials.

IV.

The conviction of petitioners under Count One, which charges them with devising a scheme and with knowingly and wilfully making one particular use of the mails in execution thereof, and their conviction under Count Eleven, which charges them with conspiring to commit the various offenses described in the first count and the subsequent substantive counts, the same evidence being relied on to sustain the conviction under both counts, constitutes a double conviction and punishment for what is essentially the same offense.

Count One, under which petitioners were convicted, charges, as has been said, the devising of a scheme to defraud, as the "genesis" of the offense, and the mailing of a particular letter as the "gist" of the offense. Petitioners

were also convicted under count Eleven, which charged them with conspiring to commit the offense alleged in count One, and the particular offenses asserted in the succeeding nine counts.

There is no evidence in the record, as will be conceded by the government, that petitioners participated in the particular use of the mails specified in count One (or in any of the other substantive counts). Bearing in mind that the substantive offense against the Mail Fraud Statute is a particular use of the mails, the question arises, how can the defendants be found guilty of such specified use of the mails, in the absence of proof of participation or, at least, knowledge of the particular act which constitutes the gist of the offense. The Court of Appeals below answered this question, but in a manner which, when analyzed, not only demonstrates the validity of petitioners' contentions in this connection, but, also, discloses the misunderstanding of the Court as to the charges of the various counts of the indictment, and as to the law. Said the Court:

> "The Government charged, not a conspiracy to commit a single act, but a continuing conspiracy to carry on the fraud for a long period of time."

The conspiracy count specifically charges that "Defendants unlawfully and knowingly conspired among themselves *to commit the various (separate) offenses against the United States which are fully described and set out in the first ten counts of the indictment.*" (R. 45.)

The offenses set out in the first ten counts of the indictment are particular uses of the mails, and specific instances of the employment of the scheme in the sale of securities. *Insofar as the devising of the scheme is concerned,* the first count, and by reference the other substantive counts, charge a conspiracy, purely and simply.

The Court below, still speaking of the conspiracy count, said:

> "It is the rule that where the accomplishment of the

> conspiracy contemplates the use of the mails, and such use is essential to the execution of the scheme, intent on the part of the conspirators to use the mails may be inferred. In the instant case the use of the mails was indispensable in carrying out the conspiracy."

Then, turning briefly to the substantive counts, the Court said:

> "It was not necessary to show intent in connection with the substantive counts of the indictment. It is enough to show that the mails were used, *and that the scheme was one which reasonably contemplated the use of the mails.*"

Realistically speaking, this is the exact equivalent of stating that if the parties schemed to use the mails, they can be held guilty of the particular, substantive offense even though there was no intent or participation in connection with such substantive offense. They were found guilty, therefore, *of scheming* to use the mails in substantive count One, and guilty *of conspiring* to use the mails in the conspiracy count. Since no other or different evidence was introduced to support the several charges of the substantive counts and the charge in the conspiracy count, the conclusion is inescapable that the petitioners were indicted, convicted and punished, for the same offense. Obviously, rules of evidence applicable to conspiracy were imported into the case by the Court in its opinion affirming the conviction of petitioners under the substantive count, *which is not a conspiracy count.* Petitioners had no participation in, or even knowledge of, the actual and specific use of the mails described in the substantive counts. They were, nevertheless, convicted of the designated substantive offense under the doctrine that they are responsible for the acts of their co-schemers, which is another way of saying "co-conspirators."

When the Government rested its case under count One, it rested its case under count Eleven. The conclusion is, hence, unavoidable that the defendants were punished twice

for what actually was the same offense, under the same evidence. All of this is apparent from the opinion of the Court of Appeals, which is in conflict with the opinions of other Circuits.

In *Freeman* v. *United States,* 146 Fed. (2d) 978 (C.C.A. 6), the Court, in speaking of the conviction of a defendant both under a substantive count and conspiracy count, said, at page 979:

> "Congress has the power to create separate and distinct offenses growing out of the same act, but whenever it appears that the proof of one offense proves every essential element of another growing out of the same act, the Fifth Amendment limits the punishment to a single act. *Gavieres* v. *United States,* 22 U. S. 338, 343, 31 S. Ct. 421, 55 L. Ed. 489."

The Court said also:

> "There can be no doubt that the substantive offenses charged in the two counts required proof of joint action, just as it was required under the third count.
>
> "In the case of *Krench* v. *United States,* 6 Cir., 42 F. (2d) 354, defendant was indicted and convicted on three counts. The first charged the bringing of merchandise into the country in violation of the Tariff Act; the second concealment of merchandise after it had been brought in, and third, the conspiracy to bring into the country the merchandise mentioned in the other counts.
>
> "We there said that proof of the conspiracy was ample, but it was clear that proof of the substantive offense included every element of the conspiracy, and that to impose a consecutive sentence on the third count was double punishment. The *Krench* case cannot be distinguished from the one at bar. It is plain from the face of the present indictment that the substantive offenses charged in the first two counts include every element of the offense charged in the third count."

See also *United States* v. *Mazzochi, et al.,* 75 Fed. (2d) 497, 498, 499 (C.C.A. 2).

The case at bar presents an identical situation.

V.

The Court of Appeals erroneously held that a substantive count of an indictment charging the violation of the mail fraud statute by the mailing of a particular letter, may be sustained by proof "that the mails were used, and that the scheme reasonably contemplated the use of the mails."

Indictments charging a particular use of the mails as constituting the violation of the mail fraud statute must be supported by proof beyond a reasonable doubt that the defendant participated in the particular act of mailing, and knowingly and with express intention caused the mails to be used as to that isolated instance with which he is specifically charged.

In two sentences the court below disposed of petitioners' contentions on this subject in the following language:

> "It was not necessary to show intent in connection with the substantive counts of the indictment. It was enough to show that the mails were used, that the scheme was one which reasonably contemplated the use of the mails."

It is true that this Court, in a number of instances, has denied certiorari in cases where Courts of Appeal have used language similar to the language used by the court below in the instant case. Denial of certiorari, however, does not constitute a decision by this Court on the questions of law presented by applications for the writ.

In effect, the opinion of the court below treats the very charging part of the substantive counts as mere surplusage and virtually strikes them from the indictment. The court has only to turn to the indictment to ascertain the charge, and when this is done it will be perceived that its deliberate language must be abandoned if the conviction of the petitioners is to be sustained. It is believed that this court, by denying certiorari, in the cases cited in a footnote to the lower court's opinion, did not intend to sanction any such result.

Count One, for example, after stating that all of the defendants devised a scheme and artifice to defraud, proceeds to state the statutory offense as follows:

> "And the defendants so having devised and intended to devise the aforesaid scheme and artifice, on or about August 19, 1941, in said District and Division and within the jurisdiction of this Court, *for the purpose of executing said scheme and artifice,* and attempting so to do, did *knowingly, wilfully,* fraudulently and feloniously cause to be delivered by mail *a certain letter and warranty deed, etc.*" (Italics supplied.)

The letter to J. W. Frazer from Frank Mansfield dated August 18, 1941, is then set forth in *haec verba.* (Tr. 18-19.)

There can be no "purpose" without intent, and to do a thing "knowingly" and "wilfully" it must be done "intentionally."

This indictment letter was sent in connection with a sale to one Arbuthnot, a transaction with which some of the petitioners had no contact whatsoever. They were convicted, however, of the substantive offense of mailing, or causing to be mailed, a particular letter—not for any other letter, nor for all mail matter sent out during the course of the enterprise, nor for a general use of the mails, nor for knowledge or intent generally to use the mails, nor for knowledge or intent that the scheme "was one which reasonably contemplated the use of the mails."

The indictment charges, as has been seen, that the defendants, *for the purpose of executing said scheme,* did *"knowingly"* and *"wilfully"* mail, or cause to be delivered by mail, *the letter of August 18, 1941.* Thus, the specific intent as to the mailing of a particular letter is charged, unmistakably, as the crime.

What is the purpose of alleging the mailing, or the causing to be mailed, of a particular piece of mail matter, if it be not in an attempt to convict the defendants of a single

offense which must be found to exist as to that specified event? If the allegation that a defendant *knowingly* and *wilfully* caused to be delivered by mail, *a certain letter,* be not the very essence and substance of the charge, and if it be but a routine formality then it is no more than an overt act in what is actually a conspiracy indictment.

The point presently urged by petitioners considers the development of the error disclosed in the preceding double-conviction point. There was no evidence that any of the petitioners mailed, or caused that letter to be mailed, or even had any knowledge of the mailing. They were convicted, nevertheless, on the theory that they devised a scheme to defraud, in the execution of which the letter was sent—by someone—which is another way of saying that the defendants conspired to cause the mails to be so used.

Stripped of legalistic sophistry, the conclusion is inescapable that petitioners were convicted under count One by resort to the conspiracy concept, and they were convicted under count Eleven, also, upon the same hypothesis.

The courts are gradually emerging from the *laissez-faire* attitude towards judgments of conviction in federal criminal cases. This is exemplified by the decision of this Court in the *Bollenbach* case (90 L. Ed. 318, Feb. 11, 1946), in majority opinions of lesser courts, and in an increasing number of powerful dissents by judges whose learning and consciences are offended by instances of judicial attitudes which, passing the bounds of tolerance, demonstrate an unhealthy juristic laxity.

The Second Circuit Court of Appeals in *United States* v. *Mazzochi,* 75 Fed. (2d) 497, said: "We have repeatedly expressed our disapproval of accumulating sentences *by verbal devices.*"

In a recent dissenting opinion by Judge Jerome Frank rendered in *United States* v. *Antonelli Fireworks Co., Inc.*

(C.C.A. 2), (May 2, 1946), it was said: "This Court has several times used vigorous language in denouncing Government counsel for such conduct as that of the United States Attorney here, but, each time, it is said, that, nevertheless, it would not reverse. * * * Such an attitude of helpless piety is, I think, undesirable. * * * If we continue to do nothing practical to prevent such conduct, we should cease to disapprove it. * * * The deprecatory words we use in our opinion on such occasions are purely ceremonial. * * * The practice of this Court—recalling the bitter tears shed by the walrus as he ate the oyster—breeds a deplorable cynical attitude towards the judiciary."

While this language refers to a subject not now before this Court, it is refreshingly indicative of the trend to return to old-fashioned principles of fair play in trials which are supposed to be fair trials.

As this court said in the *Bollenbach* case:

> "From presuming too often all errors to be prejudicial, 'the judicial pendulum need not swing to presuming all errors to be harmless,' if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty."

To sustain the opinion under discussion, in view of the language of the Mail Fraud Statute and in view of the allegations of the instant indictment, would be to renounce requirement of proof beyond a reasonable doubt, and to transpose the presumption of innocence into the presumption of guilt.

Substantive Mail Fraud counts and Securities Act counts charging specific uses of the mails, with particular felonious knowledge and intent, either mean what the grand jury has said and sworn to, or they are mere devices to procure convictions upon loose and inexact doctrines of conspiracy. It is time for such metaphysical nonsense to be arrested and sanity restored to Mail Fraud and Securities Act prosecutions.

VI.

The admission in evidence of a colored map of the area in question, in the absence of any evidence whatsoever that petitioners had any contact or connection with, or knowledge of, such map, or of its use, on the ground that such exhibit might be considered by the jury in determining the intent of the defendants on trial, constitutes highly prejudicial error which, although argued to the court of appeals, was not noticed by that court.

This Court has recently said that criminal trials for the ascertainment of guilt by a jury must proceed under appropriate judicial guidance, according to the procedure and standards of criminal trials in federal courts (*Bollenbach* v. *U. S.*, 90 L. Ed. 318).

Government Exhibit 100 (sometimes called "G-100") was a colored map containing various erroneous and highly prejudicial statements concerning the land in one of the blocks from which sales were made to customers. It was allowed to be introduced in connection with the testimony of Gunhild Benson (R. 662). She made her first purchase from one Kline, who, she said, worked for Thigpen. The witness testified that Kline made some very explicit statements concerning the colored tracts on the map. Kline was not named in the indictment and there is no evidence whatsoever that any of the present petitioners ever saw the map, ever knew of its existence, or knew anything of Kline or his activities.

The trial judge, partly perceiving the impropriety of the admission of this exhibit, said to the jury that the exhibit and the representations made in transactions had with persons not named as defendants, could not be considered by the jury as evidence of the specific offenses charged against the defendants on trial. The court then proceeded utterly to destroy the attempted limitation as to the use of such exhibit and testimony by the jury, by saying that the exhibit and the testimony "may be considered by the

jury for the purpose of determining the question of good or bad faith or intention with which representations that relate to the offenses charged in the indictment herein, were made. * * * Speaking of the map, the court said:

> "It was merely introduced as bearing upon the intention of the parties as disclosed by their action, *perhaps in other or similar matters.*" (R. 997.)

Objections were made to the introduction of the exhibit in evidence, and a formal motion to strike it was urged on the court. (R. 672-673, and R. 970.) Once in evidence, the Government proceeded to use the map with utter freedom. One Ralph Talley, superintendent of the Magnolia Petroleum Company, testified as an expert concerning the map and its falsity (R. 859-860).

Anyone familiar with trials of causes before juries knows that it was utterly impossible for the jury in the instant case to remember what each of the twenty-two customer witnesses testified to as to the several statements made to them by the ten salesmen defendants. The erroneous reception in evidence of Government's Exhibit 100 becomes, therefore, sharply important. The map, as to which petitioners had no knowledge or connection, was a piece of concrete evidence which the jury could remember —indeed they took it with them to the jury-room. With it, perhaps, the jury charted its way to the verdict of guilty.

The map and the testimony concerning it were pure hearsay as to petitioners.

On this subject the court said in *Delaney* v. *U. S.*, 263 U. S. 586: "It is contended that hearsay evidence was received against petitioner, and this is erected into a charge of the deprivation of his constitutional rights to be confronted with the witnesses against him. Hearsay evidence can have that effect, and its admission against objection constitutes error." (Citing cases.)

If ever there was a damaging and prejudicial piece of

evidence allowed to go into a record and be considered by a jury, this map was one. Its poisonous qualities affected even the Court of Appeals. Said the court below in its opinion:

> "The salesmen used various methods for making sales, but the record shows that all were made by false representations, *fraudulent* maps and promises which they had no intention of fulfilling."

The receipt in evidence of Government's Exhibit 100 was not one of those "technical" errors against which Congress protected jury verdicts. Its admission was an error, the fatal consequences of which cannot now be measured. The map was more than a mere deviation from "formal correctness" and its admission violated the "substance of the standards by which guilt is determined in our courts." The judges of the Court below, however, obviously believed that the verdict of guilty was "justifiably engendered by the dead record," but this belief, as this court has said, is not to be substituted for the procedure and standards for the ascertainment of guilt by a jury "under appropriate judicial guidance."

The Court below, concluding its opinion, said that the contentions of the petitioners that the trial court committed error in the admission of certain evidence, was without support in the record. The final sentence of the opinion is: "*We think the verdict was amply warranted by the evidence* as to all of the appellants, and the judgments appealed from are affirmed."

Thus, the opinion of the Court of Appeals comes into direct collision with the decision of this Court in *Bollenbach* v. *U. S.*, 90 L. Ed. 318.

VII.

The instruction of the trial court to the jury, to the effect that evidence relating to transactions between buyers of the land and strangers to the indictment with whom there was shown to be no connection on the part of defendants on trial, and of which transactions the defendants had no knowledge or connection, could be considered by the jury for the purpose of determining the good or bad faith or intention of the defendants on trial, constitutes error of a highly prejudicial nature.

The foregoing proposition, although urged upon the Court of Appeals by the petitioners, was not considered or even mentioned in the opinion of that court.

The District Judge instructed the jury as follows:

> "On the trial of this case, the Court will instruct you at this time, there was admitted in evidence testimony relating to transactions had with persons who are not named as defendants in this case, or who were not in any manner named in the indictment herein, and the same was admitted in evidence and *may be considered by the jury for the purpose of determining the question of good or bad faith or intention with which representations that relate to the offenses charged in the indictment were made,* and they will be no evidence of the specific offenses charged herein on which the defendants are here on trial, and the only ones in which the jury will be warranted in returning any verdict of guilty. *It was merely introduced as bearing upon the question of intention of the parties as disclosed by their actions perhaps in other or similar matters.*" (Italics supplied.) (R. 997.)

By this instruction, without any proof of contact or connection between such persons who are not named in the indictment and the defendants, the jury was told that it could explore a limitless and uncharted field of inquiry in the search for defendants' intent.

On the theory announced in this portion of the instruction, the map (Government's Exhibit 100), which is the

subject of the preceding point, found its way into the record. Much of the argument addressed by petitioners to the Court in the preceding point of this brief, is directly applicable to the attack which petitioners are hereby directing against the instruction. The same error which infected the ruling admitting the map in evidence, and admitting the testimony as to transactions had with strangers to the indictment, spread to the instructions. The argument, therefore, will not be repeated. Suffice it to say that escape from this error should not be permitted under the "harmless error" doctrine.

Before the publication of this Court's opinion in *Bollenbach* v. *U. S.*, 90 L. Ed. 318, present counsel, in the brief to the Circuit Court of Appeals in the instant case, said:

> "Who can say what effect the evidence which the Court had in mind, and of which the jury was so sharply reminded, had upon the deliberations of the jury whose verdict, on its face, reveals a strange confusion and irreconcilable inconsistency. The jurors, drawn from civil life and inexperienced in matters of law, look up, as they should, to the judge on the bench as their chief and as their mentor, whose every word possesses meaning. After a long trial, where many witnesses are heard, and upwards of 200 exhibits received, and after long arguments by counsel, the judge's final instructions are the last words the jury hears before it retires to consider its verdict. The impact of those words upon such inexperienced minds cannot be measured. It is believed that this instruction was one of the contributing causes of the quaint verdict of the jury."

In the *Bollenbach* case this Court said:

> "In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining the questions of law * * * The influence of the trial judge on the jury is necessarily and properly of great weight * * * and jurors are very watch-

> ful of the words that fall from them. Particularly in a criminal trial the judge's last word is apt to be the decisive word."

In view of the improbability of any exact recollection by the jury of the testimony of many customer witnesses, complicated as the situation was by the fact that the same customers transacted business over a considerable period of time with various of the defendants and other unindicted individuals, the map was a piece of concrete evidence which presented no memory taxing problem. The admission of such evidence, coupled with the court's instructions upon it, could not but have fatal consequences to the defendants.

The Government argued, below, that no exception was taken to this portion of the Court's instructions. When the time came to instruct the jury, a complete record had already been made upon the subject, and the defendants' views, as embodied in their objections and exceptions and motions to strike, were fully and completely presented. (R. 672-673, 859-860, 970.)

Moreover, under the rules, a reviewing court will notice a plain error of its own motion, and especially will it do so if substantial rights are affected.

When an instruction makes confusion doubly confused and uncertainty more uncertain, the importance of a charge to the jury on the vital question of the intent, is too grave to be passed over with a bored judicial yawn, and too important to a citizen whose liberty is at stake, to be classified as "harmless error."

CONCLUSION.

Not often does this Court order the issuance of the writ of certiorari in criminal cases. When it does, it sets at rest contentions repeatedly made, both by prosecutors and accused, with confusedly varying results in District and Appellate Courts. Knowledge of the infrequency with which the writ issues makes for less than complete and scientific results in Courts of Appeal, and this, in turn, develops an unfortunate response in the attitude of District Judges and prosecutors. It has become almost a legal fashion to scoff at defenses made in criminal cases—especially Mail Fraud and Conspiracy cases—no matter with what earnestness and honesty of purpose such defenses are presented. The affirmed judgment of the District Court is not in accord with the procedure and standards appropriate for criminal trials in federal courts.

The instant application involves important, unsolved problems which this Court should examine and answer, if there be any meaning to the words "Equal Justice Under Law."

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No. 355

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946.

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Petitioners.

vs.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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REPLY BRIEF FOR PETITIONERS.

INTRODUCTION.

The Brief filed on behalf of the United States in opposition to the Brief of Petitioners in support of their Petition for the Writ of Certiorari does not meet or answer the points made by Petitioners in support of their prayer for the issuance of the writ. The first ten pages, practically, of the nineteen page brief for the govern-

ment, are devoted to a preliminary statement of procedural formalities and a five page statement of the facts.

The statement of the facts makes little or no distinction in the activities of the several petitioners, but makes blanket assertions of most general nature, doubtless calculated to put the situation before this Court in such manner as adversely to affect the particular points of law called to the attention of the Court in petitioners' brief. Realizing the impropriety of burdening this Court with petitioners' deductions from the entire record, petitioners confined themselves to a few indisputable facts which were necessary for the proper consideration of the purely legal points presented.

ARGUMENT.

I.

The government makes no attempt to answer petitioners' first point to the effect that the Court of Appeals erred in failing to consider and decide the substantial issues raised by petitioners. (Petitioners' Original Brief, Point I, p. 13). Petitioners argued that the Court of Appeals, as is clear from its opinion, based its decision on the belief that petitioners were guilty on the entire record. This action by the Court of Appeals, petitioners urged, was contrary to the decision of this Court, *Bollenbach* v. *United States,* 90 L. Ed. 318, in which this Court reminded Courts of Appeal that the question before them is not whether guilt may be deduced from the record of the trial proceedings, but whether or not the accused has been found guilty under "appropriate judicial guidance." Petitioners contend that this treatment of the appeal by the court below itself necessitates disapproval by this Court.

No answer to this point is made in the government's brief.

II.

In the argument under petitioners' Point II, (Petitioners' Original Brief, p. 15), petitioners urged that they should not have been indicted or convicted for conspiracy to violate the Securities Act, because, (1) when the sales in question were made, they were selling land in fee simple, and (2) at the time of such activities they did not and could not know that the sale of land, even

though coupled with a collateral oral representation that a test well would be drilled, constituted the sale of a security.

The government attempts to meet petitioners' position by assuming, for the purpose of argument, that petitioners' contentions as to the inapplicability of the Securities Act are correct. The government's answer in this connection presents a series of *non sequiturs* (Government's Brief, p. 11). It is argued that since the conspiracy charged was based on the use of the mails and not upon the use of other instrumentalities of interstate commerce, the jury would have had to find that the conspiracy contemplated (1) use of the mails, (2) fraud to which the use of the mails was related, and (3) sales of fraudulent securities by the use of the mails. Proof of a conspiracy to violate the Securities Act, the government contends, "thus involved proof of the identical elements required to establish a conspiracy to violate the mail fraud statute, with the addition of a third element, *i. e.*, proof of the contemplated sale of securities." It is, therefore, obvious, counsel for the United States urge, that in finding petitioners guilty on count 11, the jury "must have found that they were guity of consspiracy to violate the mail fraud statute."

In this argument the government neglects to observe that the count charging conspiracy to violate Section 17 (a) of the Securities Act accuses petitioners of a particular kind of a use of the mails, namely, a use *in connection with the sale of securities in which the employment of any device, scheme or artifice to defraud is manifest.*

The government's argument is, in effect, that because the conspiracy count charged the violation of two separate federal statutes, the general proof, even though the trial court instructed separately on the two stattutes, may

be "related" to that portion of the conspiracy count which charged conspiracy to violate the mail fraud statute —after the verdict of the jury.

The verdict of the jury, the judgment of conviction thereon, and the present contentions of counsel for the government, all combine to point the danger and the injustice to a citizen accused of crime of charging him in a single count with conspiracy—a charge difficult enough in itself to defend against—to violate several federal statutes. An accused is literally helpless before such an attack.

Further answering petitioners' point I, the government argues that under the authority of *S. E. C.* v. *C. M. Joiner Leasing Corporation*, 320 U. S. 344 the sale of land in the instant case was the sale of an "investment contract." No attempt is made to refute petitioners' point that the opinion in the *Joiner* case came out long after the last of the acts of the accused took place, and that not only were petitioners ignorant of the fact that the sales made by them would be regarded as the sale of securities, but no one knew, or could know, that the transactions contravened the Securities Act until the *Joiner* decision by this Court. As petitioners heretofore argued, even the Court of Appeals for the Fifth Circuit did not know, and did not believe, that the sale of oil leaseholds, coupled with collateral promises, "timed and contingent" upon the completion of a well, constituted the sale of an investment contract within the meaning of the Securities Act.

It is argued in the government's brief, that the burden of proof was sustained and that there was sufficient evidence from which the jury "could have concluded" that petitioners conspired to sell securities, and it is contended that, "since the statute is primarily directed against

fraud, *the intent that must be established is the intent to defraud.*" (Brief for U. S. p. 13). It is submitted that no general intent to defraud can take the place of the specific intent to violate a specific statute. *The intent to defraud must be an intent to defraud in the sale of securities.* The government argues that the question as to whether a security is involved, is a question of law for the court's determination, and that, even assuming that petitioners did not unequivocally understand that their activities involved the sale of securities, their convictions under count 11 were proper because "as a matter of law they sold securities." (Brief for U. S. p. 14). In the first place, the sale of oil leaseholds coupled with collateral promises timed and contingent upon a drilling of a well, was not determined to constitute the sale of a security until after the decision by this Court in the *Joiner* case. In the second place, this Court said in the *Joiner* case that whatever the form of the subject matter of the sale might be, the Securities Act may be invoked, "*if it be proved, as a matter of fact,* that they are widely offered or dealt in under terms or conditions of dealing which establish their character in commerce as an 'investment contract,' or as any interest or instrument commonly known as a 'security' ". Certainly this language of the Court cannot be intended to imply that the Supreme Court of the United States may determine, as a matter of fact, whether the instruments said to be securities are established in commerce as investment contracts, without proof upon the subject. If this be not so, then the question as to whether any sale comes within the mischief of the Securities Act may be left open to subsequent judicial determination after indictment, or even after conviction. When this Court said, "proved as a matter of fact", it did not mean "assumed" as a matter of fact. The estab-

lishment of "their character *in commerce*" cannot mean the establishment of their character by judicial opinion.

The very reason why this Court decided to review the *Joiner* case was to decide a question which needed answer by this Court, the answer not appearing in the language of the Act itself, according, at least, to the decision in the same case by the Circuit Court of Appeals for the Fifth Circuit.

In the brief for the United States (p. 14) the case of *United States* v. *Wurzbach,* 280 U. S. 396, 399 is cited and an excerpt given from the opinion by Mr. Justice Holmes. It is to be observed that the great judge said, "whenever the law draws a line there will be cases very near each other on opposite sides." In the case at bar, the statute drew no line. It remained for this Court to extend the known boundaries of the general term "securities," to include leaseholds coupled with timed and contingent collateral promises.

The brief for the United States makes no effort to meet or to distinguish *U. S.* v. *Wiltberger,* 5 Wheat. 76; *U. S.* v. *Harris,* 177 U. S. 305; or *Sarles* v. *U. S.* 152 U. S. 570 pertinently referred to upon this subject in petitioners' brief (pp. 23-24).

III.

The government's point 2 (p. 15), considering petitioners' point III (Original Brief p. 25), admits that it is difficult to reconcile the verdict which acquitted the principal promoter, Mansfield, on count I and found the other defendants guilty on the same count. In support of its position, the government cites *Dunn* v. *United States,* 284 U. S. 390. In the *Dunn* case a single defendant was indicted in three counts, on the second and third of which he was acquitted and on the first of which he was

convicted. The Court observed that the verdict was "not *necessarily* inconsistent." (p. 393). It must be noted that in the *Dunn* case only one defendant was involved and, there being three counts, each count was treated as a separate indictment. There was no such inconsistency or incongruity as is apparent in the case at bar. Here, Mansfield, the principal defendant, was indicted on the first count for a specific violation of the Mail Fraud Statute, consisting of the depositing of a certain letter in the mails. *In the same count—not in a different count —the other defendants were convicted even though they did not actually participate in the act of mailing.* The inconsistency appears in the verdict of the jury *on a single count.*

In addition to this incomprehensible result, the jury found Mansfield guilty on other counts where the proof was identical, except as to the particular letters mailed, and acquitted other defendants whose participation was no greater than appeared in the act of mailing the first count letter. Petitioners were found guilty of conspiracy to commit offenses described in the ten preceding substantive counts, each of which involved an act of mailing. Their only connection with the act of mailing was their alleged participation in the general scheme to defraud.

The Court's attention is respectfully directed to the dissenting opinion of Mr. Justice Butler in the *Dunn* case. No one can read his careful analysis of the decisions without being persuaded to the view that such an inconsistent verdict "assumes to cut a single and indivisible truth in two."

It is submitted that this Court should decide whether verdicts such as are involved in the instant application may be held to support judgments of conviction in federal courts.

IV.

In government's point 3 (Br. p. 16) it is argued that petitioners' contention going to the propriety of convictions for conspiracy and for the substantive offense where both are bottomed solely on proof of conspiratorial connection, are answered by the decision in *Pinkerton* v. *United States,* opinion rendered July 10, 1946 (90 L. Ed. 1212).

A careful reading of the opinion by Mr. Justice Douglas will disclose that instead of supporting the government in its contentions in this respect, it actually refutes the government's position. The majority opinion proceeds upon the theory that where there is a continuous conspiracy the partners thereto act for each other in carrying it forward, with the result that an overt act of one partner may be the act of all without any new agreement specifically directed to that act. Then the opinion goes on to say that "motive or intent may be proved by the acts or declarations of some of the conspirators in furtherance of the common objective." The following language of the opinion, however, discloses that, whatever may be the law as to other indictments, the rule announced in the *Pinkerton* case can have no application to the Mail Fraud Statute. Mr. Justice Douglas said,

> "A scheme to use the mails to defraud, which is joined in by more than one person, *is a conspiracy,* * * * yet all members are responsible, although only one did the mailing."

From this language the argument is attempted that, in a substantive mail fraud count a defendant is indicted for a single use of the mails in furtherance of a conspiracy; and in the conspiracy count *he is indicted for conspiring to commit the same overt acts which are com-*

mitted in furtherance of the same conspiracy already formed. It is believed that this Court will not indulge in such circular reasoning.

The dissenting opinion by Mr. Justice Rutledge in the *Pinkerton* case, with agreement in substance by Mr. Justice Frankfurter, reveals that under the majority opinion a man may be indicted and convicted under one separate indictment for committing a given offense, and, after he has been convicted and has begun serving his sentence, he may be indicted again and convicted upon the same evidence for conspiring to commit the offense for which he is being already punished. Even if this novel idea is to persist under indictments for offenses under the Internal Revenue Code, the same doctrine cannot be applied to offenses with reference to the use of the mails under the language of the Mail Fraud Statute as it is presently phrased.

In the brief for the government it is argued that proof of the substantive offense requires evidence of an actual mailing in execution of the scheme, an element not required to be proved to establish the conspiracy charge (p. 17). The argument, however, neglects to include the further requirement that evidence of the actual mailing to be charged against a particular defendant must be brought home to such defendant. It is inconceivable that a substantive offense requiring proof of a specific intent to commit the specific offense may be proved beyond reasonable doubt by proof of a general intent to conspire or to scheme to defraud. A moment's thought upon the subject should disclose the untenability of the reasoning in the government's brief. The language of the Mail Fraud Statute (Criminal Code Sec. 215; Title 18, Sec. 338 U. S. C. A.) is,

> "Whoever, *having devised* or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent

pretenses, representations, or promises, * * * which, for the purpose of executing such scheme or artifice * * * place or cause to be placed, any letter, postal card * * * in any Post Office * * * or, authorized depository for mail matter * * * or shall *knowingly* cause to be delivered by mail according to the direction thereon * * * shall be fined * * * etc."

From this language it is plain that the scheme to defraud, or the intention to devise a scheme to defraud must precede the use of the mails which is charged as the offense. The use of the mails is in execution of the scheme or conspiracy already formed. After the government has proved the scheme, it then goes on to prove the act of mailing in execution of the unlawful plan. It is obvious that the scheme is not a scheme or conspiracy *to use the mails,* it is on the contrary, a scheme to defraud in which the use of the mails is invoked to carry out the designs of the schemers. Proof of *the scheme to defraud,* is not *proof of conspiracy to use the mails,* and yet it is that kind of proof upon which the government depends in the instant case to sustain both the conviction for the commission of the substantive offenses and for participation in the conspiracy.

The government makes no real attempt to answer petitioners' point V (Petitioners' Original Brief, p. 33). This point in petitioners' brief may be, and, indeed, should be taken into consideration in connection with point IV. In point V, the petitioners urged that proof of the commission of the substantive offense is not furnished by proof of the scheme itself, or of a so-called conspiracy to commit the same offense. As appears from the above reference to the Mail Fraud Statute, the crime as specified, is that the defendant "shall *knowingly* cause to be delivered by mail" a letter or other mail matter. The language, as has been said, imports an intention to

commit or to cause to be committed a sharply defined offense. The indictment in the instant case recognizes the statutory requirement, the offense being stated as follows:

> "And the defendants *so having devised* and intended to devise the aforesaid scheme and artifice, on or about August 19, 1941, in said District and Division and within the jurisdiction of this Court, *for the purpose of executing said scheme and artifice,* and attempting so to do, did *knowingly, wilfully,* fraudulently and feloniously cause to be delivered by mail a *certain letter and warranty deed, etc.*" (Italics supplied).

The decision of the Court below boldly erases as surplusage both the considered language of the statute and of the indictment.

A defendant does not commit two crimes by calling his same act by two names. As one highly respected Court of Appeals said, "We have repeatedly expressed our disapproval of accumulating sentences by verbal devices." (Petitioners' Original Brief, p. 35).

V.

The brief for the United States attempts to cover petitioners' points VI and VII in a comparatively few lines. Point VI in petitioners' brief is to the effect that the admission in evidence of a colored map of the area in question, in the absence of any evidence that petitioners had any contact with, or knowledge of such map, or of its use, on the ground that such exhibit might be considered by the jury in determining the intent of the defendants on trial, constituted prejudicial error. (Petitioners' Brief p. 37).

Point VII is to the effect that the instruction of the trial court that evidence relating to transactions between customers and strangers to the indictment with whom there was shown to be no connection on the part of the defendants, and of which transactions the defendants had no knowledge or connection, could be considered by the jury for the purpose of determining the good or bad faith or intention of the defendants, also constitutes prejudicial error. It would seem that the bare statement of these propositions demonstrates their validity.

The government argues that the transactions between one Kline, and one of the customers, Gunhild Benson, in which Kline showed to Benson a highly colored map, constituted evidence "from which the jury could reasonably have concluded that Kline, even though not named in the indictment was a party to the scheme to defraud, with the result that his acts in furtherance of and within the contemplation of the scheme were chargeable to all of the conspirators." (Government's Brief p. 18.) This assertion goes even further than the challenged instruction of the Trial Judge. Counsel for the government urge upon this Court that evidence between customers and a stranger to the indictment may be "assumed" by the jury to constitute proof against the defendants. This is nothing less than asserting that the jury may indulge in a presumption of guilt.

The government contends, also, that it is clear from the record "that the colored map was of such a character *that it could fairly be concluded* that its use was within the reasonable contemplation of the scheme." (Government's Brief p. 19). Here is another assumption and another presumption of guilt. Such so-called proof does not possess the virtue of circumstantial evidence indicating any guilt on the part of the defendants on trial.

The government then proceeds to argue that the challenged map was identical with the others except that certain areas were blocked off in color to show alleged holdings of different oil companies. (Government's Brief p. 19). The blocking off of areas in color to show holdings of oil companies on the map in question plainly converts the colored map into a totally different picture of the area than would be shown by a mere outline map such *as may have been* used by some of the defendants. Indeed, if the colored map was truly "identical" then why clutter the record with such accumulated documents, especially when the map in question was, so far as the record discloses, never even seen by any of the petitioners.

It is not only the Kline map but the Kline transactions to which petitioners object. If the prosecutor may call witnesses to testify to transactions with utter strangers, in the absence of any knowledge of such transactions by defendants standing trial for their liberty, then all barriers to conviction are down, and there is no limit to which the prosecutor may not go in procuring the conviction of men standing trial under the Mail Fraud Statute, the Securities Act or the Conspiracy Statute.

CONCLUSION.

The best reply which petitioners can make to the brief for the United States is to request the Court, after reading the government's brief, to re-read petitioners' opening brief. If this be done, it is believed, it will be apparent that no adequate answer has been made to the

points called to the attention of the Court as reasons why the writ of certiorari should be issued.

Respectfully submitted,

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CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 355

W. O. BROWNE, E. W. NEGLEY, M. J. DOBSON, MERRILL NEWMAN, MORRIS J. NEWMAN, AND BEN T. STOWELL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 1183–1188, 1189) is reported *sub nom. Mansfield et al.* v. *United States* at 155 F. 2d 952.

JURISDICTION

The judgment of the circuit court of appeals was entered May 23, 1946 (R. 1188), and a petition for rehearing (R. 1190–1192) was denied July 2, 1946 (R. 1193). The petition for a writ

of certiorari was docketed August 2, 1946, 31 days after the entry of the order of the circuit court of appeals denying a rehearing. The Government thereupon filed a memorandum suggesting that the petition should be denied for want of jurisdiction because it was not filed within the 30-day period allowed by Rule 37 (b) (2) of the Federal Rules of Criminal Procedure (see also Rule 45 (a)). Thereafter, one of the attorneys for petitioners filed an affidavit showing that the petition was actually delivered by the Railway Express Agency, Inc., at the Supreme Court building on August 1 at 4:00 p. m. In view of this fact, we do not now contest the timeliness of the petition.

QUESTIONS PRESENTED

1. Whether petitioners' convictions of conspiracy to violate the mail fraud statute and the Securities Act in the sale of alleged oil lands by representing, *inter alia,* that the land was being exploited for oil, are invalid on the grounds (a) that such sales were not sales of "securities" within the meaning of the latter statute, and (b) that petitioners did not realize at the time that the sale of securities was involved, within the holding of a subsequent decision of this Court.

2. Whether petitioners' convictions on count 1 should be reversed on the ground of inconsistency in the verdict.

3. Whether petitioners could be properly convicted and punished for the separate offenses of mail fraud and conspiracy to commit mail fraud where they did not participate directly in the substantive offense but were chargeable therewith as parties to a conspiracy which contemplated such activity.

4. Whether the trial court erred in admitting in evidence a map displayed by a salesman who was not indicted which misrepresented development aspects of the land involved in the conspiracy, and in instructing the jury that they could consider this evidence on the question of the defendants' good faith.

STATUTES INVOLVED

The Securities Act of 1933 as amended (c. 38, title 1, 48 Stat. 74, 905) provides in pertinent part as follows:

> Sec. 2. (1) [15 U. S. C. 77b (1)] The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guar-

antee of, or warrant or right to subscribe to or purchase, any of the foregoing.

* * * * *

Sec. 17. (a) [15 U. S. C. 77q (a)] It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

* * * * *

Sec. 24. [15 U. S. C. 77x] Any person who willfully violates any of the provisions of this title, * * * shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both.

Section 215 of the Criminal Code (18 U. S. C. 338) provides in pertinent part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * *

shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, * * * or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

STATEMENT

An eleven-count indictment was returned in the District Court for the Western District of Texas on August 8, 1944, charging that petitioners and others, including Frank Mansfield and L. A. Thigpen, had conceived and executed a scheme to defraud investors in the sale of alleged oil lands, in violation of the mail fraud statute (Cr. Code, § 215) and the fraud provisions of the Securities Act of 1933 (§ 17 (a)) (R. 6–47). Counts 1–5 were based on the mail fraud statute (R. 7–23), counts 6–10 on the Securities Act (R. 23–45), and count 11 charged a conspiracy

to violate both statutes (R. 45–46). The jury found petitioners guilty on counts 1 and 11 and acquitted them on counts 2 through 10 (R. 150–152); Mansfield was acquitted on count 1 and convicted on counts 2 through 11 (R. 149). Petitioners were each sentenced to pay a fine of $1,000 and to imprisonment for three years on count 1, and to imprisonment for 15 months on count 11, the imprisonment sentences to run consecutively (R. 158). On appeal to the Circuit Court of Appeals for the Fifth Circuit, the convictions were affirmed (R. 1188).

The evidence in support of the convictions may be briefly summarized as follows:

In March 1938, Mansfield made arrangements to purchase from the Central Securities Company, of San Antonio, Texas, parcels of a 20,640-acre tract of land located in Brewster County, Texas. The oral agreement made at that time was that Central would sell parcels from the tract to Mansfield at $1.50 per acre and execute deeds as he paid for it.[1] This was not an exclusive arrangement, and Central, at various times, sold sizeable parcels to other people at the same price (R. 241–257). Shortly after entering into this agree-

[1] The evidence showed that Mansfield purchased a total of 3,840 acres from Central, which were resold to investors in pursuance of the scheme. It also showed that 228 spurious deeds purporting to convey an additional 4,765 acres were given to investors for acreage which Mansfield had never purchased from Central or which he had previously sold to others. (See R. 243–244, 452–453, 482, 486.)

ment with Central, Mansfield met Thigpen in San Antonio and they made an arrangement whereby Thigpen was to establish an office in Los Angeles, California, under the name of Interstate Realty Company for the purpose of selling the Brewster County land (R. 870–871). Petitioners were active as salesmen or promoters in that enterprise (Browne—R. 871, 385, 402, 413, 529, 788; Negley and Dobson—R. 566, 629, 630, 642, 643, 665, 678, 702, 704, 735, 739, 742, 744; Morris J. and Merrill Newman—R. 492–493, 570, 632, 643, 666–667, 679, 742, 747, 779; Stowell—R. 397, 601–603, 630, 632, 871).

The gist of the scheme was to sell the Brewster County land to California investors on the representation that it was valuable oil land. To impress investors that this was true, Thigpen conducted drilling operations which produced no oil and were finally abandoned (Gov. Exs. 91, R. 1101; 92, R. 1103–1104). Some investors were shown pictures of these alleged test wells (see, e. g., R. 273, 414). In addition, investors were often shown maps purporting to depict the geological structure of the land and potential oil deposits (see, e. g., Gov. Exs. 5, R. 274–275, 1030; 14, R. 295–296, 1038; 34, R. 383–384, 1054; and R. 550, 619, 744). To give the maps an appearance of authenticity, they bore a legend indicating that they had been prepared by certain experts of the University of Texas (*ibid.*). One of these ex-

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perts, Dr. E. H. Sellards, denied the authenticity of the maps (R. 344–345) and the truth of the information recorded thereon as to the location of oil structures and operations (R. 340–351). His testimony as to the falsity of the information on the maps was corroborated by another expert (R. 839–841). The evidence further showed that Thigpen's drillings were not based upon geological information and that discovery of oil would have been purely fortuitous (R. 359, 1117); that the structural formation of the land and its surface geology definitely negated any prospect of discovering oil (R. 357–361, 1117); that the land is remote and inaccessible except by foot or horseback and is practically uninhabited (Gov. Ex. 56, at R. 1076–1077); and that the nearest oil producing land is approximately 140 miles distant (R. 845, 941).

This land, purchased from Central at $1.50 per acre, was sold by petitioners to California investors at $20 per acre in almost every instance (see, e. g., R. 386, 529, 602, 681, 705, 725, 738, 808), and petitioners received commission of 40 to 50 per cent (R. 872). The sales plan utilized by the defendants was the commonly known "reloading scheme"; that is, the object was to induce the same investor to make several purchases. That object was effected as follows: One of the petitioners would sell an investor a few acres, representing that major oil companies were drilling in close proximity to the land (see, e. g.,

R. 375–376, 471–472, 488, 618, 631, 640, 642); that there was a great deal of leasing activity in that area by certain major companies (see, e. g., R. 534, 550); or that the Brewster County tract was about to come into production, that the major companies were interested in it and would soon be drilling on the tract, and that within a matter of weeks the investor would receive a bonus of several hundred dollars per acre and oil royalties (see, e. g., R. 488, 492, 522, 632, 665–667, 686, 727, 737, 743, 779). These representations were shown to be completely false by the testimony of officials of three of the major oil companies named by petitioners (see R. 839–845, 859–860, 960). References to the Thigpen drilling operations and the maps were also important phases of the sales program. (See p. 7, *supra*.)

After an initial sale had been thus effected, further sales to the same investor were accomplished by one of several techniques. One device was to have a salesman call upon an investor and introduce himself as the representative of a major oil company which, on the basis of extensive study of the area for oil prospects, desired to acquire large tracts of the Brewster County land. He would show the investor an apparently genuine check for thousands of dollars which he stated the company would pay the investor as a bonus for a lease of his land. The salesman would leave his name and address in the event the investor desired to contact him. Then, on inquiry

by the investor, the initial salesman or another would sell the investor additional acreage; the investor could not thereafter locate the oil company representative. (See, e. g., R. 267–271, 371–386.) Another device was for petitioners to represent to an investor that certain New York interests were about to "block up" a large number of leases on the Brewster County land and that very shortly a large "cash distribution" would be made to investors who had large blocks taken up by the New York groups. The investor was urged to buy sufficient acreage so that he could participate. After the investor bought additional acreage, he was never approached by any member of the alleged New York group or anyone else with offers to lease his land. (See, e. g., R. 492–496, 570–571.) A variation of the latter device was to persuade the investor to make further purchases on the representation that larger blocks were necessary to participate in a proposed "community lease" (see, e. g., R. 630, 640, 643, 657, 704–711).

ARGUMENT

1. Petitioners do not question the sufficiency of the evidence to support their convictions. They contend, first, that they could not properly be tried and convicted of conspiracy to violate the Securities Act (count 11), because (a) they sold only land and not securities, and (b) they could not have intended to sell securities in violation of

the Act, since it was not known that the interests they sold constituted securities until the later decision of this Court in *S. E. C.* v. *Joiner Corp.*, 320 U. S. 344 (Br. 5–7, 15–24). Assuming, for the moment, that petitioners' contentions as to the inapplicability of the Securities Act are correct, their convictions on count 11 are nevertheless valid. That count charged a conspiracy to violate the mail fraud statute as well as the Securities Act. Since that conspiracy was based upon projected use of the mails and not upon use of other instrumentalities of interstate commerce, the jury would have had to find, in order to find petitioners guilty of conspiracy to violate the Securities Act, that the conspiracy contemplated (1) use of the mails, (2) fraud to which the use of the mails was related, and (3) sales of fraudulent securities by use of the mails. Proof of a conspiracy to violate Section 17 (a) of the Securities Act thus involved proof of the identical elements required to establish a conspiracy to violate the mail fraud statute, with the addition of a third element, i. e., proof of the contemplated sale of securities. See *United States* v. *Rollnick,* 91 F. 2d 911, 918 (C. C. A. 2); *United States* v. *Montgomery,* 21 F. Supp. 770 (D. N. Mex.); *United States* v. *Alluan,* 13 F. Supp. 289, 291 (N. D. Tex.). It is obvious, therefore, that in finding petitioners guilty on count 11, the jury necessarily must have found, at least, that they were guilty of conspiracy to violate the mail fraud statute.

In addition, it is clear, within the controlling authority of the *Joiner* case, that the transactions here involved the sale of "investment contracts" within the definition of a "security" in Section 2 (1) of the Securities Act, *supra,* pp. 3–4. The sales of the land were accompanied by various representations that the sellers were drilling for oil, that large oil companies were interested in exploitation work on the land, and that the investors would earn large profits in bonuses and royalties from these activities and from their participation in enterprises engaged in blocking large tracts of the land for exploitation or resale. Thus, the record shows that the investors were induced to purchase the land, not for its value *per se* or for use or development by their own efforts, but rather because of the profits that were held out to them if they participated in the larger enterprises for the exploitation or resale of the land. This participation for the profit to be made in enterprises conducted by others gave the transactions all the characteristics of an investment contract in the same measure as did the transactions in the *Joiner* case. See also *Securities and Exchange Commission* v. *Howey Co.,* No. 483, O. T. 1945, decided May 27, 1946. Cf. pp. 41–43 of the Brief for the United States in Opposition in *Baker et al.* v. *United States,* Nos. 484–486, O. T. 1946, certiorari denied October 28, 1946.

The burden of petitioners' argument on this point is directed to the contention that at the time of their activities they did not know their

transactions involved the sale of securities, and that to apply the later decision of this Court in the *Joiner* case would result in an *ex post facto* conviction. Petitioners further argue that in a criminal prosecution, as distinguished from a civil action in which the burden of proof is less stringent, the Government must establish beyond a reasonable doubt that the transactions involved securities. We submit that this burden of proof was sustained, and that there was sufficient evidence from which the jury could have concluded beyond a reasonable doubt that petitioners conspired to and did sell securities within the intendment of the Act. In any event, petitioners misconceive the requirements of proof in a criminal prosecution based upon Section 17 (a) of the Securities Act. Under that provision, the Government must establish that a defendant (1) by use of the mails or other instrumentalities of interstate commerce, (2) in the sale of securities, (3) employed a device, scheme, or artifice to defraud. Since the statute is primarily directed against fraud, the intent that must be established is the intent to defraud. Cf. *Blue* v. *United States,* 138 F. 2d 351, 358–359 (C. C. A. 6), certiorari denied, 322 U. S. 737; *Silkworth* v. *United States,* 10 F. 2d 711, 719 (C. C. A. 2), certiorari denied, 271 U. S. 664; *Newingham* v. *United States,* 4 F. 2d 490, 492 (C. C. A. 3), certiorari denied, 268 U. S. 703; *Kasle* v. *United States,* 233 Fed. 878, 882 (C. C. A. 6). The question

whether a security is involved is a question of law for the court's determination (note R. 1003–1005) and is objectively determined from all the circumstances. Cf. *Blumenthal* v. *United States,* 88 F. 2d 522, 528 (C. C. A. 8). Thus, even assuming that petitioners did not unequivocally understand that their activities involved the sale of securities, their convictions on count 11, in so far as they are predicated upon a conspiracy to violate the Securities Act, are proper, since (a) as a matter of law they sold securities, and (b) there was proof beyond a reasonable doubt that in the sale of these securities by use of the mails they employed a scheme to defraud. In any event, it is patent that petitioners, experienced in the oil investment business, at least had reason to believe that the interests they sold might be held to be securities, so that their intent to violate the Securities Act could be justifiably inferred. As Justice Holmes said in *United States* v. *Wurzbach,* 280 U. S. 396, 399:

> * * * we imagine that no one not in search of trouble would feel any. Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk. *Nash* v. *United States,* 229 U. S. 373.

See also *Horning* v. *District of Columbia,* 254 U. S. 135, 137; *McGunnigal* v. *United States,* 151 F. (2d) 162, 165–166 (C. C. A. 1), certiorari denied, 326 U. S. 776.

2. Petitioners contend that in acquitting the principal promoter, Mansfield, on count 1 and finding them guilty thereon, the jury showed such inconsistency and misunderstanding that its verdict cannot stand (Br. 7–8, 25–29). Admittedly, it is difficult to reconcile the verdict in this respect. And it is true that in *Speiller* v. *United States,* 31 F. (2d) 682, 683–684, upon which petitioners rely, the Circuit Court of Appeals for the Third Circuit held that an inconsistent verdict cannot stand. However, as pointed out in that decision, most of the other circuit courts of appeal had taken a different view. The question was decisively settled in favor of the latter view by the subsequent decision of this Court in *Dunn* v. *United States,* 284 U. S. 390, where it was stated (p. 393):

> Consistency in the verdict is not necessary. * * * As was said in *Steckler* v. *United States,* 7 F. (2) 59, 60:
>
> "The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no

right to exercise, but to which they were disposed through lenity."

3. Petitioners also contend that since their convictions on count 1 (the substantive offense of mail fraud) and count 11 (conspiracy to commit the substantive offenses) were predicated solely on evidence of their participation in the scheme to defraud and there was no separate evidence showing that they were directly connected with the transactions on which count 1 was predicated, their convictions and sentences on both counts constitute double punishment (Br. 8–9, 29–32); and that they could not be convicted of the substantive offense solely on evidence of their connection with the conspiracy, without further proof that they participated directly in the mailing on which that count was based (Br. 9–10, 33–36). In short, the contentions go to the propriety of convictions of conspiracy and the objective offense where both are bottomed solely on proof of the conspiratorial connection. Whatever doubts there may previously have been as to the legality of such a prosecution and sentence, they have been dissipated by the decision of this Court in *Pinkerton* v. *United States,* rendered June 10, 1946, No. 719, O. T. 1945, where convictions and separate sentences for substantive offenses under the Internal Revenue Code and for conspiracy to commit those offenses were affirmed, even though as to one of the petitioners the convictions were based solely on his conspira-

torial connection and he was not shown to have participated directly in the commission of the substantive offenses. Nor does the instant case fall within the exception noted in the *Pinkerton* decision (slip opinion, p. 2), where the conspiracy is merged in the substantive offense because the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime. It was not indispensable to the proof of the scheme charged in count 1, as it was to proof of the conspiracy charged in count 11, to show an agreement between two or more persons, because the substantive offense could, within the requirements of the mail fraud statute, have been the product of a single mind. Moreover, proof of the substantive offense required evidence of an actual mailing in execution of the scheme, an element not required to be proved to establish the conspiracy charge.

4. Petitioners' last contentions are that the trial judge committed prejudicial error (a) in admitting in evidence a certain colored map of the Brewster County area (Gov. Ex. 100, R. 672–673, 1110) which had been given to an investor-witness by one Kline, who was not named as a co-conspirator in the indictment, and (b) in instructing the jury that this evidence could be considered for the purpose of determining the question of the good faith or intention with which

the representations concerning the land were made (Br. 10–12, 37–42). Petitioners concede that the map was false and misleading in many respects (Br. 37), and they argue that it was improperly admitted against them because Kline was not named in the indictment and there was no evidence that they knew of the map or of Kline's activities.

The map in question was given to Miss Gunhild Benson by Kline in connection with a sale to her of a parcel of the Brewster County land (R. 672). Miss Benson testified that she paid the money for these purchases to Thigpen of Interstate (R. 663, 672), so that it is evident that Kline was a salesmen working for Thigpen in the enterprise involved here. This was evidence, therefore, from which the jury could reasonably have concluded that Kline, even though not named in the indictment, was a party to the scheme to defraud, with the result that his acts in furtherance of and within the contemplation of the scheme were chargeable to all of the conspirators. Cf. *Heflin* v. *United States,* 132 F. 2d 907, 909 (C. C. A. 5); *United States* v. *General Motors Corp.,* 121 F. 2d 376 (C. C. A. 7), certiorari denied, 314 U. S. 618; *Lewis* v. *United States,* 11 F. 2d 745, 747 (C. C. A. 6); *DeWitt* v. *United States,* 291 Fed. 995, 999 (C. C. A. 6), certiorari denied, 263 U. S. 714; *Isenhouer* v. *United States,* 256 Fed. 842 (C. C. A. 8). Moreover, it is clear from the record that the

colored map was of such a character that it could fairly be concluded that its use was within the reasonable contemplation of the scheme. Comparison of this map and its use with other maps utilized by petitioners (see p. 7, *supra*) supports this conclusion. This map was identical with the others except that certain areas were blocked off in color to show alleged holdings of major oil companies. Government Exhibit 5 (R. 274–275), which Thigpen gave to one investor-witness, was similiarly blocked off, although not in color. Furthermore, there was an abundance of evidence that petitioners, both in connection with their use of the other maps and orally, represented that various major oil companies had holdings around the area in question. The evidence as to Kline's activities, therefore, was admissible for the jury's consideration on the issue of the defendants' intent. Cf. *Clune* v. *United States,* 159 U. S. 590, 593; *Isenhouer* v. *United States,* 256 Fed. 842 (C. C. A. 8); *Pandolfo* v. *United States,* 286 Fed. 8, 18 (C. C. A. 7); *Osborne* v. *United States,* 17 F. 2d 246, 249 (C. C. A. 9); *Ridenour* v. *United States,* 14 F. 2d 888, 891 (C. C. A. 3).

CONCLUSION

The decision below is clearly correct, and the petition for a writ of certiorari presents no problems of importance or real conflict of decisions.

We therefore respectfully submit that it should be denied.

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